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Yours Truly
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LIFE

OF

DAVID BELDEN

"No keener wit,
No intellect more subtle, none more bold
Was found in all our host."

New York, and Toronto, Canada:
BELDEN BROTHERS.

1891.

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LIFE OF DAVID BELDEN

PREFACE

IN the preparation of this work the editor has been confronted from time to time with serious obstacles.

The circumstances attending Judge Belden's early life in California have combined to render the acquirement of facts and details well-nigh impossible. At the same time, the expectation of securing a complete account of his subsequent career remained unrealized, owing to the decease of intimate friends who might have supplied the needed material.

The character, attainments, and extended reputation of the man, however, seemed to demand the services of a biographer; consequently, in default of more complete records, it was deemed advisable to present in their present disconnected form the chief incidents of his life, together with some of his contributions to the various departments of learning.

In the compilation of this volume, I should acknowledge my indebtedness to many, but more especially to Mr. C. M. Shortridge, of the "San Jose Mercury," and Mr. J. J. Owen, of "The Golden Gate," who have generously supplied valuable and much-needed information; to Judge Niles Searles and Hon. M. J. Farrell for facts not elsewhere obtainable; and to Mr. H. S. Foote for efficient aid in collecting and arranging material derived from various sources. To the San Jose press also, whose columns I have so freely utilized, my obligations are many.

The permanent character of the memorial, however, is due to the thoughtfulness of Mrs. Belden, whose untiring efforts in its behalf cannot be too highly appreciated.

JOHN J. BERRY, M.D.

PORTSMOUTH, N.H.,
JUNE 1ST, 1890.

LIFE OF DAVID BELDEN

CHAPTER I.

DAVID BELDEN was born in Newtown, Fairfield County, Connecticut, on the 14th of August, 1832.

His family was an old one, having been identified with the history of New-England since early colonial times. Among his more immediate ancestors were many eminent in the professions and also prominently associated with the political parties of the day. His father, David H. Belden, was for more than forty years a leading member of the Fairfield County Bar, and enjoyed, moreover, a well-deserved reputation throughout the State.

It was his misfortune when but three years of age to be left motherless, an event which had a marked bearing upon his early career.

His education was derived from the schools of his native town, but it was his inordinate love of reading rather than any systematic training that gave him that almost inexhaustible fund of knowledge so remarkable for one of his age. In early youth he assimilated whatever books the home library afforded, such as translations of the classics, and works of ancient and modern historians, poets, essayists, and biographers. Afterwards he turned his attention to his father's law library and found therein a new source of pleasure and interest, which later on, under the most adverse circumstances, seemed never to flag.

It would not have been strange had the boy, with his marked originality, mature judgment and vast stock of information, aided by a memory which rendered everything available, developed into something of an egotist. Yet on the contrary, he was one of the most unassuming of beings and diffident even to the degree of morbidness. Years afterwards, in recalling his boyhood days, he stated that the fear of being considered mentally "below par" rendered all intercourse with strangers at that time absolutely painful.

Notwithstanding his love of books, he possessed a large supply of spirit and energy and was foremost among his companions in all sports and adventures. His father, who was a stern disciplinarian, did not approve of these boyish pranks and as a means of curbing his exuberant spirits, bound him out at the age of sixteen as an apprentice to a carpenter. Four years of faithful service rendered him not only a skilful workman, but also intensified his previous determination to adopt the profession of law. His leisure moments, which often encroached upon the time requisite for sleep, were utilized in preparation for this object, so that at the expiration of his term of service, which had been shortened somewhat by the payment of an equivalent in money, he was acknowledged to be better read in law than many practitioners.

On the attainment of his majority in 1853, a small patrimony received from his grandfather, John Johnson, enabled him to carry out more readily his long-cherished intention to visit the Pacific coast. He therefore embraced without hesitation the opportunity offered, and ere long placed the width of the continent between himself and his native state. Arrived in California, he went directly to Nevada City, but a few weeks afterwards took up his residence in Yuba County, remaining in Marysville and its vicinity for about a year. During this time he was engaged in mining on the Yuba, but with indifferent success.

His first systematic work in legal investigation was undertaken while residing with his friend, Col. Brophy, on whose ranch he was engaged in erecting some buildings. Brophy claimed title to this property under an incohate Mexican grant which was at the time in course of litigation. Young Belden, becoming interested in the case of his employer, soon mastered the facts of the case, and, at his earliest leisure, took up the subject of "Spanish Land Law," as applied to California and became in course of time well informed on what was then a most important branch of jurisprudence in a large portion of the state.

In the winter of 1854-5, while in Marysville, he formed the acquaintance of James H. Churchman, then a prominent lawyer of Nevada City, and having made some arrangement with him for the study and practice of law, removed to the latter place, taking with him his books, of which, for the times, he possessed a considerable number.

That he was inclined to place a very low estimate upon his early attainments is shown by the remark he afterwards made in referring to his trip to Nevada City. He said:—"Had I lost those books of mine in crossing the Yuba River, the sole evidence of my being a lawyer would have gone down stream."

His association with Churchman was nominal rather than real. The latter was a man of rare ability and varied accomplishments, but, unfortunately, was also of irregular and dissipated habits, and wholly wanting in those orderly and exact business methods essential to financial success. As a result, Churchman received and expended the fees, while the junior member was obliged to pay the office rent and other fixed expenses—a privilege which the latter did not thoroughly appreciate. Accordingly, in November of the same year, the partnership was dissolved, Belden expressing at the time a full confidence in his ability to both care for and expend his own earnings.

He was admitted to practice in the District Court at the October term in 1855, and during that period made his debut in a Court of Record, where he acquitted himself very creditably in a number of minor cases, but as the entire records of this Court were destroyed by fire in July of the following year, no accurate information regarding their titles, number or importance can now be obtained.

At the Plumas Term he was also employed in a number of cases, and exhibited rare skill in the mastery and conduct of the same. His forensic ability, his fund of anecdote and his genial nature impressed deeply the members of the bar of that county, and for years afterwards the Judge of the court upon visiting that locality was invariably called upon to answer a multitude of questions as to Mr. Belden and his sayings.

In the spring of 1856 the latter formed a partnership with A. C. Niles. This, however, existed only until the great fire of the same year, when the whole city having been destroyed and all business suspended, the firm was dissolved. It was some time during this year that he was admitted to practice in the Supreme Court.

The Nevada County Bar at this period was composed of many young men of marked ability, of whom a considerable number have since attained celebrity. Besides Niles and McFarland, who afterwards became Chief Justices of the Supreme Court, may be mentioned J. R. McConnell, who was Attorney-General of the State; A. A. Sargent, who became a U. S. Senator from California; William M. Stewart, at present a U. S. Senator from the State of Nevada; T. P. Hawley, the present Chief Justice of the State of Nevada; Niles Searls, the District Judge of that day, but who has since filled the office of Chief Justice; and later, Judge Garber, Supreme Judge of Nevada, a leading lawyer and life-long friend of Mr. Belden.

To state that Mr. Belden, in this aggregation of energy and ability easily held his own, and, when pitted against the most brilliant of them, proved himself a foeman worthy of their steel, is perhaps praise enough. It goes without saying that he was not at this time the profound lawyer which he subsequently became, but he nevertheless exhibited many of the evidences of future greatness—the same power of analysis, the aptness at comparison, and the faculty of seizing upon the strong point of a case and exposing fallacy. As a speaker he was always forcible, and sometimes eloquent. His power of ridicule was a source of fear and discomfiture to his opponents—in fact so potent was it that a friend once ventured to assert that he "could shame a hungry mule from a well-filled manger of barley."

As a further illustration of this faculty, as well as of his sturdy independence, we quote from Thompson & West's "History of Nevada County" a speech delivered by him on the 4th of July, 1857, under the following circumstances: A burlesque celebration of the day was attempted by a portion of the citizens of Nevada. A procession in which figured mock Chinamen, Mrs. Partington, soldiers armed with wooden swords with tin buttons and epaulettes, and other grotesque figures paraded the streets and, quite unconscious of the reception that awaited them, halted in front of a stand erected on Broad Street. After the Declaration of Independence had been read, the orator of the day was introduced, and spoke as follows:—

Gentlemen of the Windy Guards and Fellow Citizens:—When in the course of human events it becomes necessary for a speaker to address an audience of this description, a decent respect for the opinions of mankind and a proper regard for his own character, require that those causes which place him in this position should be laid before the community.

Opposing to the best of my abilities the demonstration of this day, and contesting each measure whose object was an exhibition of this character, I have only to assure this audience that there exists between myself and these masqueraders no community of feeling, no sympathy of sentiment, and I shall address myself briefly to those gentlemen who have forced me upon the community as the orator of this occasion.

Gentlemen of the Windy Guards:—Eighty-one years since, upon the day which we now commemorate, our revolutionary ancestors pledged for their freedom and ours, their lives, their fortunes and their sacred honors. In this our celebration of that event, prudence would not permit us, if called upon, to peril our valuable lives—our fortunes are laid up where neither moth, nor rust, nor revolutions can change them; but the little that is ours, our sacred honor, we have this day sacrificed with a prodigality worthy of a better cause. It was but little; but like the widow's mite, it was our all. (Groans and demonstrations of dissatisfaction by the Guards.)

Gentlemen, it is meet and proper that you should groan. Good cause has the community to groan with you and for you. Upon an occasion when you should feel like patriots and act like men, you have disguised yourselves as mountebanks and acted like fools. (Groans by the Guards and cheers by the outsiders.)

You have defiled these streets, prostituting yourselves in an exhibition disgraceful to you as men, sacrilegious to you as Americans. (Renewed groaning, cheering and confusion.) You have in your feeble effort to desecrate a day sacred and venerable from the associations of the past and our national landmark for the future, embalmed yourselves in merited ridicule and contempt. (Great confusion. The Windy Guards shoulder arms, call for music and march off groaning.)

It is not surprising that men who have so little respect for themselves, or for this day, should interrupt their speaker. They have furnished another argument in support of the Hindoo religion, and gone beyond the doctrines of the Brahmins. They have shown us that the dissolution of the body is not necessary for the transmigration of the soul; but that while in the body, spirits can assume the animal forms to which their instincts incline them. But, gentlemen, as those whose special orator I am have left, I shall not inflict upon you what was designed for their special edification, but, in a few words, excuse myself to you.

Here the speaker spoke of the reverence due to the day. If it could not be celebrated in a proper manner, it should not be burlesqued. Exhibitions of the character just seen are evidences of degeneracy. "We can," he said, "make ourselves objects of pity to some, contempt to others, and ridicule to all; but the day itself, with its mighty memories, is safe and sacred in the history of the past. We may widen the gulf that separates us from the past, but we cannot cross to pollute it." Three cheers were given to the orator at the conclusion of his stirring address. The Windy Guards did at first a little quiet cursing, but finally joined in the laugh at their own expense.

The only other professional partnership which Mr. Belden indulged in was with a lawyer named Yant, and was entered into in 1857, but lasted only a very short time. In illustration of some of the latter's peculiarities, which were many, he used to relate the following anecdote, which is obtained from the same source as the speech above quoted:

The firm of Martin & Yant, which once existed, was one that walked in the humbler paths of the profession. The former was from the "Sunny South," while the latter hailed from Ohio and retained a full share of the idioms of the Buckeye State. During one of those depressions to which all mining communities are subject, not being overburdened with business, they concluded to try their hand at quartz mining. The mining enterprise, however, was soon abandoned, and Martin's explanation of the cause, and theory of the legal rights of the respective parties, are thus given by Mr. Belden: "I'll tell you all about it," said M. "I stood more from Y. than any man ever did from another since Hull surrendered at Detroit; but there were some things that flesh and blood couldn't stand. I wanted to get along, for I liked Y., and didn't find any fault when he made me cut the wood and do the cooking, and wash the dishes, and when he put me in all the mean places in the mine; and I stood his drinking all the whiskey and swearing that I had done it; and I let him eat potatoes and milk, and mustard on watermelon, and sugar on his beans, and molasses on his pork, but when he would call it '*them molusses*,' that was too much. I couldn't stand that, and I wouldn't. I told Y. that he had got to quit that infernal '*them*' or it would bust the firm, and it did it. I was right about that, Belden, old boy. That sort of conduct would bust out any firm in the world. There's no foolishness about this. I've been looking up the law. Story is full of it; full as a goose. He says no man has a right to use such language to his partner; that the court will enjoin him and appoint a receiver. He says that's where the Chancellor gets his work in. That's the glory of our equity system. When it finds a fellow saying '*them molusses*' to his partner, it just sets down on him."

Yant was a man with only a limited knowledge of law, but was possessed of good business habits, and having a wide circle of acquaintances among the miners and a great aptitude for obtaining business, the firm prospered while it lasted. Mr. Belden was accustomed to say that Yant led the victims to the altar and he sacrificed them.

In politics Mr. Belden was originally a Democrat, but when civil war became imminent, he gave his whole influence in behalf of the Union party. His efforts in this interest cannot be too highly estimated. The isolated position of California at that time, and the fact that a large portion of her population was of Southern birth and ardently attached to the Confederacy, combined to render her condition extremely critical. It was due to the efforts of such men as he that California did not fall into the ranks of secession or was not desolated by war. Of what the outcome of the great conflict would be, he entertained no doubts whatever, and he manifested this confidence by investing his accumulations in Government bonds, then at a great discount. To a friend who questioned the wisdom of this act, he replied: "If the Government fails to keep its promise, I shall have no need of money." This unwavering faith had in course of time its due reward.

In 1858, when the Kansas-Nebraska conflict caused a split in the ranks, he allied himself to the Squatter Sovereignty on Douglas' wing of the party, and became its candidate for County Judge. Henry M. Moore, locater of Moore's Flat, and afterwards a leader of the workingmen in San Francisco, was his opponent. The contest was a hot and energetic one and resulted in the election of Mr. Belden by a majority of one vote. On the morning of the election he was met by Moore, who proposed to vote for him if he (Belden) would in turn cast his ballot for him. "Oh, I can't do that," replied Belden, "I have always made it a rule to vote for the best man." This reply was of course unanswerable.

During the four years' service upon the Bench of the County Court, Judge Belden was prompt and efficient in the discharge of his duties, and as he was, under the law, entitled to practice in the District Court, he soon acquired an extensive and lucrative practice, and at the same time established his reputation as a lawyer and jurist. At the expiration of his term, he declined a re-election, much to the regret of his friends and constituents.

One of the first cases in which he was engaged was that of an insolvent debtor in the person of a carpenter named Thomas. Having requested of him a list of his indebtedness, Thomas promised to write it out for him and did so. Mr. Belden glanced over it, and finding the writing much plainer than his would be, filed it with the complaint. The debtor was in due time discharged from his liabilities. When Mr. Belden called upon him in course of time for his fee, which was $50, Thomas calmly informed him that it was included in the list of his debts, and so it was. The remarks which the Judge is supposed to have indulged in at that particular time have never been recorded.

In the "History of Nevada County" may be found an account of another case with which he was identified :

It appears that a certain Alexander Lones sued a military company at Nevada, called the Nevada Rifles, for the rent of their armory, at the corner of Main and Commercial streets. Flurshutz, a brewer, had owned the building and rented it to the company. He mortgaged it to Lones, who foreclosed and brought in the property, of which he took a kind of forcible possession. He afterwards brought this suit to recover rent. Rufus Shoemaker, County Clerk, and at one time editor of the *Grass Valley Union*, a portly gentleman, was captain of the company. Mr. Belden drew the following answer, which is inserted in full without apology for its length, as it is replete with humor. Hank Knerr was a member of the Rifles, and signed as attorney, though not a lawyer, as any one could practice in Justice's Courts. "Peter Mushaway, Esq.," referred to in the answer, was a well-known local character, half pauper and wholly bummer. The "King of Pungo" was I. C. Malbon, first City Marshall. The exhibits were prepared by John Pattison, the local Nast, and were drawn on yellow paper, with proper embellishments. The case was tried before Justice E. W. Smith, and appealed to the County Court, among the records of which the pleadings may be seen by the curious to this day. The reader will notice that with all the extravagant humor of the answer, the pleader kept an eye to a good defence.

Before E. W. Smith, J. P.,
Nevada Township and County.

State of California, County of Nevada.
H. A. Lones, Plaintiff,
vs.
Rufus Shoemaker, *et. al.*, Defendants.

Now comes Henry Knerr, especially retained for this cause, and answering personally and severally for each of the defendants therein sued, shows to this Court that the judicial iniquity of this attempt of plaintiff is unparalleled and his impudence unprecedented in the history of men. Defendants further show through the said Knerr, their learned counsel, that language and the forms of speech are unable to convey their true feelings and the wrongs they have suffered at the hands of this plaintiff ; wherefore the defendants refer this Court to the several exhibits appended to and accompanying this answer, and made part thereof. They deny, first, each and every allegation of plaintiff's complaint ; and they also take this opportunity of expressing their astonishment at the moral obliquity of the plaintiff, which induces him to make such statements. They refer him to the case of Ananias and Sapphira, his wife (1st Paul), as a precedent in point, and a wholesome warning to plaintiff. Having thus generally answered, defendants, by their said counsel, Knerr, proceed to particularize; and they deny that said plaintiff now is, or ever was, the owner of the certain house upon Main street; but defendants say that said plaintiff's possession of said premises was most violent and summary, as will more fully appear by reference to Exhibit A, hereby referred to and made part of this answer. Wherefore these defendants say that one Mr. Flurshutz, a gentleman of Teutonic extraction, is owner of said premises, and that he doth likewise compound a very refreshing beverage called lager beer. And these defendants say that they have, for a long time, to wit, for the period of three years, paid their rent to the said Flurshutz in small sums, to wit, in sums amounting to one and two bits.

And defendants, further answering, say they have not leased the said premises of the plaintiff, nor do they hold the same, nor have they held the same under him, nor have they in any way attorned to him for the use of the same. But defendants show that said plaintiff has often attempted to lease said premises to these defendants, and to induce said defendants to attorn to him, the said plaintiff, as landlord, as will more clearly appear by reference to Exhibit B, made part of this answer.

But defendants say that, firm in their integrity of purpose, unseduced by flattery, as undismayed by disaster, they have resisted his importunities; that they have never recognized him as their landlord, and that, completely disgusted by his present course, it is their settled intention to never recognize him in any capacity whatever. And the defendants further show that during the term and time in which said plaintiff charges these defendants with the occupation of said premises, the same were held and occupied under a lease from said plaintiff by one Madam Clark as a dancing school, and that these defendants were evicted and ejected by said Madam Clark, the lessee of said plaintiff These defendants, proceeding to narrate the facts connected therewith, show that, being naturally men of sanguinary propensities, they did march, arrayed in gorgeous apparel, very wonderful to behold, and with divers fearful weapons, to the said hall, to the end that a certain doughty warrior, one King of Pungo, should instruct them in the slaughter of men. And defendants show that, as they drew near to said hall, they heard music and the sounds of revelry, whereupon, with the speed of the antelope, or of divers antelopes, said defendants did incontinently rush towards said hall. And defendants show that, as they entered said hall, there came out against them divers women, as more fully appears by Exhibit C No 1, hereby referred to as part of this answer. And defendants show that before they could get up to their muskets, they were dispossessed, evicted and ejected from said premises, as most specially appears from said Exhibit C No. 2, whereby defendants say they suffered great loss in uniform, munitions of war, wind and tuition in the art of strategic warfare, to have been given by the aforesaid King. And defendants, further answering, show that during the term of said occupancy, as sued upon by said plaintiff, said premises and building were out of repair and inaccessible, on account of the ruinous condition thereof, and that said plaintiff did suffer and permit said premises to thus become untenable, well knowing the condition thereof; and said defendants aver that, although as brave as lions, they are wise as serpents, and well knowing the premises, and that if the premises fell upon said defendants there would not be a grease spot left of any one, save and except their captain, said defendants did, with great courage, but some haste, retreat from said building. And defendants show that the weapons and munitions of war owned by these defendants and in said building would have been utterly lost and destroyed but for the exertions of a certain courageous individual, P. Mushaway, Esq., said Mushaway removing, at the peril of his life, liberty and the pursuit of happiness, the said munitions of war and commissary stores therefrom, said Mushaway being hereby referred to by these defendants as Exhibit E, and made part of this answer. Said defendants further refer to Exhibit D, herewith filed, as more fully explaining the condition of said premises and the exertions of said Mushaway. And defendants further refer to Nos. 1 and 2 of Exhibit E, as more fully explaining the condition of said premises, the whole thereof being made part of this answer. And defendants show that, in consequence of the condition of said premises, these defendants have suffered loss and injury in the sum and to the amount of seven thousand four hundred and thirty-eight dollars and eighty-one cents, in manner and form following, to wit: These defendants show that during the year 1858, the Indians upon the frontiers of California, and in the neighboring State of Oregon, did proceed to massacre the white population then and there living. [See Senator Gwin's letter to Mr. Buchanan, hereby referred to and made part of this answer.] And these defendants show that had said defendants been sufficiently trained in the art and science of war, these said defendants would have been employed by the Government to exterminate said Indians. And said defendants show that they are informed and verily believe that had they taken the field, said Indians would now be extinct and wiped out, and that the feats of horrid war performed by these defendants would have redounded to their glory and the national honor in the sum above set forth. And defendants refer this Court to Exhibit F, as more fully illustrating the intentions of these defendants, said exhibit being made part of this answer. But defendants show that on account of the ruinous condition of said building, defendants were not trained; and not being trained, were not taken; and not being taken, did not perform these feats; whereby they have suffered loss and injury in the sum and to the amount above named. And defendants, finally answering, deny that they are, or any of them are indebted to said plaintiff in the sum set forth, or in any sum whatever. And they further say that said building was in a ruinous condition, unfit for occupancy, at the times sued upon by said plaintiff, wherefore they pray to be dismissed with costs and money disbursements.

HENRY KNERR,
Attorney for Defendants.

To the answer were attached ludicrous illustrations of the points made by the document, drawn on yellow paper and marked "Exhibits A to F."

As may be inferred, his time and talents were not wholly absorbed in the practice of his profession. He contributed frequently to the newspapers and periodicals and was a leading member of the "Sons of Temperance." His extensive learning and masterly eloquence combined with great originality, had before this attracted attention and his services were in constant demand for lectures, addresses and political speeches.

The few now in existence will stand as fair samples of his style and diction.

The following lecture was one of the first delivered by him in California, and was read before some charitable society in Nevada City, in 1856, when he was about twenty-five years of age:

FRILLS.

Frills are by Webster defined to be ruffles or ornaments. As, however, understood in this country and disclosed by the investigation of philosophy, the subject becomes of deep import, interweaving itself with the history of the past, the controlling causes of the present and our aspirations and ambitions for the future. In their broadest signification, Frills may be termed the superfluities of life that brought into existence which is unnecessary for it; the exercise of self-esteem vanity's bid for admiration. It is also a quality confined to man and as exclusively human as is reason. Wherever a kindred development exists in an inferior species, it will be found imitative and not original. Nature uncontrolled knows no superfluities. Each work of her creative hand fills fully and no more its respective condition, and in conformity with this general rule, the lower man stands in the scale of creation, the less his disposition for external ornament. It is when the human animal finds its wants supplied and its necessities provided for that its latent pride develops itself in sumptuous mansions and gorgeous apparel. These become the accompaniments of wealth and power. Not as necessary to it, but as means by which the successful adventurer exhibits to the world his changed and superior condition. Assumed as the livery of fortune her minions sport them with the same pride and complacency with which the lackeys of nobility wear the badges of their servitude and degradation. Nor is this peculiarity of our species, this human quality of ostentation, confined to any age or limited to any race. It belongs to us a genus and to understand its antiquity and extent we need not confine our researches to history, although her pages are but the story of human pride and folly. Yet back of that, beyond the shadowy past from which history rescues her dim, wild legends, there come to us the records of another world, of a race whose tomb was the waves of the great primal flood and whose remembrance is well-nigh lost in oblivion. Over their cities a hundred forests have arisen, flourished and decayed. A thousand generations of men have marched behind them to the tomb. Conquest and slavery, prosperity and desolation have passed them by and left them unchanged. With their first founders' impress they are before us, remembrancers of the misty past to the eternal future. But it is in their pride and folly that alone they live. Amid these wrecks of cities and scraps of empire, the curious traveller searches in vain for tool of artizan or implement of agriculture, for a solitary art or invention by which man's wants might be supplied or his comforts enhanced. Mementoes of the pride and prosperity of the antediluvians are all that remain to us. Palaces and sculptured tombs, temples to the gods and monuments to the great, statues of kings, the sculptors record of victories add triumphs of royalty crowned and slavery fettered vanity's effort to outlive itself is the little and all that we know of a race and generations of men. Of their laws, customs or religion we find scarce a trace. Arts and inventions are alike wanting. From all that they have left the historian can gather but this: that they were and that they carved stones. That this people had attained a high degree of civilization cannot be doubted. The magnitude of their works bespeak power, wealth and established law. It was from abundance that they became ostentatious, but of the foundations of their greatness, the sources of their wealth, we know nothing. They founded temples to Ceres but none of her sheaves grace the shrine. The work of the architect and the artizan remain, but his tools were buried with him.

With the following age we are better acquainted. The discovery and use of letters is the bridge that spans time, connecting the present with the past and future. This is to us, the Beginning. In it were founded the mighty empires of the east, cities whose recorded magnificence seems fabulous and whose ruins remain a wonder. But from the chronicles of these ancient days we learn but little of that vanished people. Their historians and poets wrote and sang of kings, of courts and palaces, of the triumps of war and the spoils of conquest; but the men who waged those wars, who peopled those cities and piled those monuments are forgotten. Time leaves of them no trace and infant letters' first task was to record not man, but his folly. Even Egypt, muse of the arts, remembers her tyrants, but forgets her children. True, we are told of the magnitude of her works, of her aqueducts and her lakes whose waters were a barrier of fertility and verdure which the desert could not pass. But the historian remembers these as the glories of the king, not the wealth of the people. The nation whose superfluities or vices created these monuments, found no place on the scroll of history, and the fountains, the basis of old Egypt's prosperity and grandeur, are lost in the gathering sands of Time, as are her fertility fields beneath the moving sands of the desert. The Egypt of to-day, true to her ancestry, exults in ostentation of the past. What matters it that her ancient kings, grasping at the future, forgot the present; that to raise the monuments her treasures were wasted, her people enslaved and the Gardens of the World made its desert and desolation? The object of its ruler was accomplished. Ambition had its toy and the pyramids were piled, as enduring as the earth they cumbered, to stand for all time, the giant record of Egypt's folly, the Frills of the Pharaohs.

Leaving the past, with its ruins and trophies as relics of a barbarous age, and the follies of man in the infancy of the world, passing unnoticed that era in which the Dark Ages cast their shadow upon our race, we come to the much lauded nineteenth century—that daybreak to a benighted world and beacon to future generations. We weigh the pursuits and aspirations of to-day in the same scale, we gauge them by the same standard by which we judge the deed of five thousand years ago, and lo, the mankind of to-day are but the copyists, the degenerate emulators of the founders of Nineveh, the builders of the pyramids. Unchanged by the rolling centuries, we raise useless monuments, dedicate temples and deify heroes. But unlike the men of the Old World, we do it quickly and cheaply. With the same insatiate craving for fame and immortality is mingled a spirit of avarice and an element of deception which makes our follies, when compared with theirs, petty humbugs. Our statesmen and warriors are modelled in plaster of Paris, our temples are brick and lathe and stucco. Were we to attempt a pyramid it would be built under contract and finished within a year, constructed of pine boards and sand. When completed the people would have to pay twenty-five cents for a sight—nurses with children half-price. The ambition of to-day is to make the greatest present display at the least expense and to excel in frippery our fellows. We would like futurity to admire us, but we cannot wait and will not pay for their admiration. In our dwellings convenience is sacrificed to fashion and common sense and good taste are alike outraged in decoration. Some Grecian edifice is taken as a model and the plan by the original architect developed in marble and as enduring as time, is revamped and revised by modern genius in pine, paint and putty. Illustrations of this modern frill are upon every hand. The house of an esteemed acquaintance is patterned from the temple of Apollo, but the troop of juveniles would indicate the worship of another deity than the God of Music. Another is modelled from a Grecian shrine sacred to Minerva, but none save a crusty bachelor would insinuate that the Goddess of War was the household divinity. A third holds forth in a miniature copy of the Roman Pantheon. Enter this last and you will find nothing corresponding with the ostentatious exterior.

In the Young America there congregated there is material ample for future statesmen, warriors and poets; but, unlike its Roman prototype, the Pantheon of the past, our modern structure is but the nursery for the future. And these absurdities characterize most of our efforts at architectural display. We imagine that the same work that decorated a marble edifice of the proportions of those ancient days must still be ornamental, though applied to a structure of pine scarcely larger or more substantial than a tent. Aping those works which, from their harmony, association and adaptation to the objects for which they were created, have been deemed, and justly, marvels of beauty and simplicity, are lost in tasteless, senseless decoration in which the means of the builder and the object of the building are alike forgotten in our anxiety to equal or excel our neighbors in fripperies and useless expenditures. Architectural frills are, however, but a small portion of these weaknesses of our race, and it were a hopeless task attempting to enumerate the several features which this peculiarity assumes in different classes and individuals. For the purpose of this essay it must suffice if we briefly glance at a few of those prominent follies by which the mass of mankind are to a certain extent influenced and governed. Among the most prominent of these will be found pride of birth and ancestry. There may be some reason or palliation for exhibitions of gratified pride when the work of our own hands or the product of our own individual efforts and skill possesses superior merit, or is commended by our fellows, but it is not so easy or natural to understand how or why a man should arrogate to himself credit for a matter in which he has so little voice as in the selection of his ancestors. It is certainly owing to no exertion of ability of his own that he is born to honors instead of toils, and yet there is scarcely a quality we can possess from which we will assume, or the world defer to us as much, importance as this adventitious one of birth. And in tendering our homage we do not require that its object inherit marked ability or great virtue, or even that these qualities should exist in his lineage. It is sufficient to entitle the possessor to our deference that he knows who were his ancestors. There may have been a dark age—a benighted period in this world's history when physiology was not understood—when proving a man's lineage was necessary to establish the fact that he had ancestors; but in this enlightened day and generation it is conceded by all that progenitors must exist where progeny is found. If, then, one general law governs human succession, and our races are the offspring of one common stock, the question of birth and genealogy becomes solely one of memory. Fredrick Augustus Snob may convince himself from musty records, lying tombstones and garbled history that he is in the direct descent from Joseph Tomkins Snob, of the reign of Henry the Eighth, and the scion of the Snob family will think himself vastly superior to his fellow-citizen, Smith, who regards the genealogical tree of the Smith family, root, branches and all, in himself. And yet it can be demonstrated that Smith is the lineal descendant of one John Doe, real name unknown, who had moved and had his being four thousand years ago. The fact is mathematically certain that both the Smith and the Snob families existed long anteriorly to either record or tradition, and because the generations of Snobs saw fit to transmit to us the names under which they lived, forsooth the last of the Snobs must arrogate to himself credit and position which all the Smiths are eager to acknowledge and admit. Had our ancestors imagined that the time would ever come when a man would be respected in proportion to the number of generations through which he could trace by name his lineage, we would all of us have the documents, like a family record, to show our succession from Noah. But the ancestors of most of us sagely concluded that after they had been dead for a few centuries we could be of but little use to them, and also knew that they could be of no mortal benefit to us. They accordingly contented themselves with giving us an existence, without boring the world with the why and the wherefore of it. Taking, however, the whole thing into consideration, we find that, as a rule, the Snobs have nothing else to boast of; that those whom the world deems illustrious for their parentage are rarely distinguished for anything else, and the airs and importance they assume by virtue of this exalted condition are, to a reasonable mind, about as absurd as it would be should the monkey of an organ-grinder demand our veneration because his species were once the gods of Egypt. The Egyptians were fools for worshipping them, and they were nothing but monkeys when worshipped. The world has at last learned that the monkey does not make much of a deity, and he has consequently been deposed. When they arrive at the same conclusion in reference to the descendants of many ancestors, Mr. Fredrick Augustus Snob, with his long pedigree, will have to fall into line with the useful but less ornamental Smith. There may be, and perhaps is, less of this pride of birth under our democratic institutions than in monarchial governments, but the wonder is that it exists at all. Claiming that individual merit should be the sole passport to honor or respect, we still pompously parade ourselves before the world as sons of the Pilgrims, or members of the first families, while the community in which we move, judging of the sires by the sons, see the best of reasons why the Pilgrim Fathers left England as they did, and pray earnestly that the first families may be the last. But independent of these local honors, we Americans have another and universal pedigree—a theme of everlasting exultation. The soldiers of the Revolution have transmitted to us a patent of nobility which, like the hand of Providence, covers the whole land. I would not offer a suggestion in disparagement of these patriots, but if we are all the sons of sires who fought and bled and died in the Revolution, I can only say that those martyrs employed the time allotted to them on earth to great advantage. But why should we waste the present in tracing the past? The offspring of one common parent, we are heirs in our own right to whatever of glory or greatness this world has produced. It was our ancestry that walked the earth in its infancy and won for themselves and for us the proud title of Lords of Creation. Each triumph and achievement of our species is the common advantage and glory of all. It is man, not as an individual, but as a representative of the race and age, that braves the pestilence of the tropics and breasts the icy barriers of the pole—that traverse alike the viewless air and the secret caverns of the deep. Ours is the civilization that gives to the earth peace and clothes it with plenty. Centuries are our ancestry, history our record and the world our heritage. The whole of the past is ours, and the generations to come are our posterity. By us the garnered wisdom and science of our species is transmitted to the future; not through the petty and corrupt rivulets of family ancestry, but in one swelling, undistinguished and eternal flood of humanity.

All of us, however, are not born to honors and few possess those inherent elements of greatness which can compete with ancestral distinction. For all such therefore, an accommodating custom has arranged another "frill" which, unlike her other bauble and confined to a select few, she throws to the masses for him to wear who wins. "Honorable position" is the name by which this last frippery is known and when analyzed it means this: that society, finding it necessary that certain things shall be done, has agreed to regard the doing as meritorious. Not that any benefit accrues to the country from the performance of these acts or that the person thus honored is capable of accomplishing what he undertakes. We attach the honor to the position and not to the performance or results, and we regard the incumbent honorable with the same propriety with which you deem your lecturer a minister because suffered to appear in a pulpit, or yourselves Christians for happening to be within a church. These positions which confer such honors upon the fortunate incumbents, are either those political distinctions, bought by corruption or won by intrigue, and oftener the reward of knaves or decorations of fools than the badges of honor or ornaments of honest ability or those employments which fashion dignifies with the title of professions. The first include that class who are unable to take care of themselves and yet deem themselves competent guardians of the people, who stand as models of patriotic resignation ever ready to be forced by their friends into any position of public servitude, who scarce wait for an office to require an official before, in the language of an ancient saint, name to your lecturer unknown, they respond "Here, Lord, is thy servant, do unto him as seemeth good in thine eyes." That the dignity and assumption of officials belongs to the position and not to the individual is demonstrated by the wondrous change from the crysalis in the candidate to the full-blown butterfly in the incumbent. The one all deference and sycophancy, the other all arrogance and pride. We crawl to position and then live in lofty scorn of those who will not humble themselves that they may be exalted. Like an actor in a half stocked theatre, each represents a dozen characters, and perhaps, after the overture, the fiddler in the orchestra steps under the footlights and onto the stage in all the assumed dignity of an ermined judge. The employments, to attempt even without accomplishing which, are termed professions, are medicine, war, law and divinity. These are perhaps termed professions as contradistinguished from practice, and the term may be used as a synonym of "assumption" or "pretention." If so, it is not inappropriate. Leaving, however, the term and its interpretation to the curious and inquiring, we find that those engaged in these vocations with our official dignitaries, constitutes a species of aristocracy, that they move in one circle and revolve in one sphere which no mere tradesman or mechanic can enter. Aping the manners of hereditary aristocracy they bear as their heraldic emblem upon their coat of arms, instead of lion or eagle, a codfish rampant. In this country they are recognized by the humble orders with an appellation beautifully expressive and significant, but scarcely appropriate to this lecture or occasion. To rank with these our nabobs, neither ability nor capacity is required. Pretensions to any vocation, save one of manual labor, or disavowal of all usefulness, either assumed or real, is sufficient. Regarding these positions as the certain road to upper snobdom, it is not singular that we find them filled with a class whose only adaption for such pursuits is their utter disqualification for anything else. Others have simply mistaken their calling and waste in one position those abilities which would make the honored and respected in another. Plenty there are whom a liberal world terms lawyers, who are strangers to the first principles of common sense; doctors who, to judge from their works, squandering at the healing art talents which would make them tolerable soldiers or splendid butchers; soldiers whose lamb-like and peaceable disposition peculiarly qualify them for the ministry, and grave and reverend doctors of divinity who would be perfectly at home in the knavery of the law or the chicanery of politics. It matters not how little of capacity we bring to our usurped positions. Unlike the other vocations of life the professional aspirant is honored for his pretension. Like our homage to religion, we bow at the shrine though vice or folly minister at the altar. It is not easy to understand why the physician who prescribes for sickness should stand higher in the social scale than the miller who provides the essentials of health; the soldier who, for price, massacres men than the butcher who slaughters beef. But so it is, and this is one of the frills of society from which we will not emancipate ourselves. If we chance to occupy one of these positions we arrogate ourselves all the honors, if not, we allow and pay them to those who do. Measured by this scale, the artizan, whose inventions enrich a nation, stands below a lawyer whose business is but half a support, and complete uselessness outranks usefulness however extended. The mechanic whose bridge spans a dividing river, unites communities by a tie, compared with which royal alliances, diplomatic policy and parchment treaties are cobwebs. These latter are the forms of court, unknown, unheeded by the masses, but the structure of the carpenter is the league with the people, the artery through which the trade of commerce of nations flows and mingles. This is an alliance by which prosperity, acquaintance and mutual necessity weds rival communities, and yet the artizan who forges the link, the architect who schemes and executes this band of union would not be recognized by the secretary of an ambassador or the lackey of a legation. The student of history may imagine that the foundation of England's greatness lay in her warriors and statesmen; that Wellington, Nelson, Pitt and Burke were her first benefactors; but philosophy and fact both teach us that Arkwright, Stephenson and her mechanics established her prosperity. It was their inventive genius that made her what she now is, the workshop of the world. The battles of Waterloo and the Nile were fought not for the glory of England or her safety, but that the looms of Manchester might have the continent for their market. It was the weavers of England that armed Europe. The spinning-jenny of Arkwright overthrew Napoleon. At some day not far distant a man may rise whose genius shall shake Albion on her sea-girt throne, but not through diplomacy or war can she be successfully assailed. Foremost in civilization and mistress of the sea she bids defiance to both. But the humble artizan of some other nation, some smoke-begrimed son of toil may invent iron sinews, out-toiling those of England, machinery nearer perfection and defying competition. Against such an antagonist, the workshops that exiled Bonaparte and conquered India would be powerless. Famine must seize Britain's thousand looms and famine her crowded cities, attacked through that trade by which she lives. Her navies would rot upon the waves they rule and her empire, founded by a mechanic, would fall by the superior genius of mechanism. The era upon which we are now entering is destined to do away with the follies of caste and raise the laboring man and the mechanic to their true positions in the social world. Libraries and lyceums place within reach of all that information from which professions have heretofore pretended superiority, and when, through any honorable employment, the avenues are opened by which merit and ability can obtain distinction and command respect, we shall find, instead of overstocked and disgraced professions, each man striving for honorable pre-eminence in that calling to which his nature best adapts him.

Useless expenditure is another of those frills to which all of us are in some measure liable; that disposition which invests labor and money in articles of cost rather than utility. This is the quality that builds splendid houses for the community to gape and stare at, and then erects a hovel, called a kitchen, for the owner to live in; which buys furniture for its veneering and books for their binding, deriving neither use from the one or knowledge from the other; which gauges value by cost and not by convenience and makes the mansions of the rich the museums of fools.

Nor is the pride that springs from extensive acquisitions to be excused by any of the reasons which palliate the exhibitions of human vanity for other causes. The scion of ancestral rank may have inherited with his title, virtue and ability. The incumbent of either official or professional position is presumed to possess honesty and capacity; he is credited at least with those qualifications to his place. But Mr. John Snooks, the retired fish merchant, who accumulates his fortune by the sale of porgies, cannot receive a greater insult than to be asked if he produced the statuary, pictures or costly furniture which fills his house and upon which he prides himself. The artizan who executes a beautiful and ingenious article may justly be proud of his work; but why or how the man who merely makes of his residence a storehouse for cabinet-makers and upholsterers can arrogate to himself any credit for their ingenuity or skill, is not so intelligible. If any merit attach to such a mechanism or art it is his who conceives and executes, not the man's who owns and exhibits. The world has seen fit, though, to award to us whatever credit may attach from possession, and cabinet-makers and tailors taking advantage of this freak of fashion, have us all for their showmen. We may object to this thraldom but we cannot successfully resist it. For every dollar spent on the useful we disburse two for the ornamental. Means or ability have no consideration. The community furnishes our judgment but never supplies our purse. It fixes the dimensions to which we must inflate ourselves and if we burst it is our bad luck. In every transaction of life, from the houses in which we live to the most trifling article of apparel, our own taste or convenience is the last consulted. Foppery issues its mandates, Fashion endorses them, and we must succumb. Men who would have marched without flinching against the Malakoff, quail before the essenced puppies of the metropolis and follow, humble votaries in the train of fashion-walking advertisements of a tailor's conceits. Not half the beauties of this system are seen, however, in the sacrifices of wealth to the requirements of folly. We are not all wealthy fishmongers, and despite our efforts we are liable to be out-done in extravagant exhibition by some more fortunate competitor. Such not infrequently eke out their shortcomings by a little exaggeration, a term which, freed from its frills, means lying. To an individual of this class there is no subject but furnishes food for his conceit. If of humble parentage he finds consolation in the coincidence of being born in about the same time and manner with some regal prince. Is his light under a bushel and his name unknown to fame, he has relatives with a world-wide reputation, and his own retirement is the offspring of his excessive modesty. If deeds of arms or feats of chivalry win laurels, his scars, his massacres, his deeds of horrid war would harrow up your blood, if you believed him. The possessions of one of his class may not be what a trafficing world would deem valuable, but they are generally rare and always rich in association. There is a tradition connected with every room in his house and a tragedy with the cellar. His barn is not as well stored with hay as with strange reminiscences. He owns the first copy of every book as well as the last edition. His wine is the oldest, his eggs the newest, his pedigree the longest and his piecrust the shortest that were ever known. He is the master of all science and the patron of all art. He understands every vice and possesses every virtue. No event ever transpired which he had not a thousand times predicted; no discovery which he hadn't suggested. The very ills of life minister to his vanity. He thinks his limping graceful; would be delighted with a singular attack of colic and supremely happy could he break his neck in some astonishing manner. And so, by one class squandering what they have and the other magnifying what they have not, is created and kept in being what is termed fashionable society.

Another of the frills of life and one which barbarism alone is excused in adopting, is the senseless fashion which decks the rational being in tawdry metal and shining stones. Among savage tribes and barbarous nations there may be reason and necessity for the owner retaining on his person whatever he might deem of value, the only title by which he holds it being that of possession. Under the barbaric usages the wealthy savage carried his treasures and his trophies where his own prowess could secure them. Covered with the scalps of vanquished enemies and hung with wampum, his presence was the evidence both of his wealth and his achievements in war. But in a land and among a people where right and not might confers title, there is no reason why we should practice this useless custom and wind ourselves with even golden wampum. But while the custom, with all the folly and none of the necessity which justifies the Indian's display of his treasures remains in full force, with us, the beacon light of civilization and experience has taught that an altogether different conclusion follows the civilized and savage exhibitions. The wampum of the latter is wealth itself, the currency of his race, and upon his display there is no discount. But as a rule, where civilization sports the most of her wampum jewelry we find the least currency. The conclusion that a rational man would deduce from seeing another wearing the precious metals with chains and rings would be that he had more than he could use or required as a medium of currency; but if the truth could be ascertained we would very likely find that, like his copper-colored brother, the white man was getting his wampum into shape in which he might protect it from his unrelenting foe, the constable. In fact, the savage shows far more sense and taste in his decorations than do we with all our boasted progress. We laugh at the Indians who parade our streets, their heads covered with tar and their necks with oyster shells. But let the shell whose varied hues reflect all the colors of the rainbow, contain a pebble called a pearl, the disease of an oyster, formless, hueless and useless, and forthwith, fools that we are, we rate it at a king's ransom. Dull and shapeless, we sacrilegiously pretend that it adds charms to beauty, and if there is a particle of poetry in our disposition we indite a sonnet to some fair damsel in which we compare her eyes to the production of a sick oyster. Diamonds there are too—charcoal in a concentrated form and useful for cutting glass. We get, however, as many of them as we can, set them in metals to prevent their being used for anything, stick them on to ourselves and find a gaping crowd ready to admire and wonder. And yet we do not glorify the man for any intrinsic beauty which his ornament may possess. None but the expert can distinguish the manufactured pearl or diamond from the real; and yet the man who should sport a paste diamond worth a dollar would be regarded as a fool and expelled from genteel society, while the man whose gem, to all appearances, the counterpart of the dollar production, yet cost one thousand dollars, would find all avenues open to him. Our views upon this matter may be unfashionable, but we should consider the latter individual to be the greater fool by $999.00. By the rules and usages of society, the owner is not credited with, or honored by the beauty of the gem or jewel which he possesses, but by the amount of money which he wastes upon it. The means by which this jewel denominated "precious stone" attained its present high standard of worth is not easily ascertained. Useless in the arts and too scarce for a currency its value is purely fictitious; and yet in every age of the world, these baubles have been estimated at fabulous prices. Provinces have been purchased with them and wars waged for their possession. Even in this day of light and civilization the proudest ornament known to wealth or sported by royalty are these useless, glittering pebbles. History informs us that an Egyptian queen, desirous of astonishing with her extravagance a Roman lover, dissolved in vinegar a pearl of enormous value and swallowed it at a draught. But the discoveries of the age have developed new solvents, means by which any species of property may be reduced to its original elements and swallowed. Nearly all alcoholic combinations produce this effect, and to jewelry this improvement is most commonly applied. If, then, some civilized Indian whose gorgeous wampum of chains, diamonds and rings has won for him the envy of the men and the affection of the women, should change the garb to that simple decoration which decency prescribes, you may safely calculate that he is about to rehearse the exploit of Cleopatra, and that he is soaking his jewels preparatory to swallowing them. We do not for a moment object to these displays. In this enlightened age there are plenty of men complimentary enough to judge us by our clothes and trinkets, who regard man the work of the Deity as a valuable production, but in no way comparable to the same animal decorated and improved by the tailor and jeweler; who regard the glitter of a diamond as an ample equivalent for brilliancy of genius—a metal chain full compensation for learning—a glossy coat for a threadbare character—a spotless shirt for a spotted reputation. We cannot blame a man for thus buying what supplies alike the deficiencies of nature and the waste of dissipation and folly, but we can brand ourselves as idiots when we receive these as the equivalent of either.

Another of our whims is our simulated and sickly admiration for things ancient and decayed; our respect for a thing because it is old. This is the disposition which prizes a worm-eaten manuscript above a respectable copy, and gives legal currency for obsolete coins; that turns from the finest of modern structures to admire some shapeless ruin; that denounces as vandalism the changing of a useless pyramid into some useful structure, or some ruined castle into comfortable cottages; which is ever arrayed against that spirit of progress which knows nothing of the past too sacred to be made useful in the present. Those there are who regret that we have not the ruined castles of Europe; who are ever contrasting the present with that era of barbaric ignorance and feudal tyranny falsely termed the "Age of Gold"; who judge each relic of superstition, each memento of power, for what they term its associations. Strip from the history of those days the fancies with which romance and poetry have clothed it, and we should turn with horror and loathing from the picture. It would show the lords of these stately castles to be robbers, their strongholds dens of thieves, their occupation war and their revenue plunder. We should see a people abject and degraded, pillaged alike by their foes and plundered by their feudal chiefs.

Debauchery, rapine and slaughter ruled, and the will of the savage baron was the law of the land. Contrast associations like these with the facts of the present and we find the English peasant of to-day under his own vine and fig-tree with none to molest or make him afraid. The granite walls that sheltered his ancestry in the storms of war lie in ruins, but a mightier power and a broader shield is his protection. The Magna Charta, the British Constitution is his safeguard, while throughout the land justice holds the courts and establishes the supremacy of a law to which peer and peasant are alike amenable. Compare the England of the fifteenth century with the England of to-day, and instead of clinging with sickly fondness to these relics of a barbarous age he would turn from them with horror as stains on her escutcheon, the records of blood and shame in her history. It is, however, impossible within the limits of this desultory essay to even glance at the numberless follies of our species. I shall, however, advert to that class of men whose admiration of themselves is almost idolatry; who believe that earthly felicity consists in being envied by men and admired by women; that mistake folly for wit, foppery for elegance and imbecility for delicacy. Specimens of this species, decorated and polished, festoon with wreaths of verdant softness the avenues of churches and public edifices, while their pictures, from the show case of every photographic artist, like the castor-tree, bloom and smile in sickening sweetness upon all beholders. The mistakes of nature they represent alike, namely—woman's weakness and man's vice. Nor is it singular that they try to correct the blunder of their creation and approximate the sex for which they were designed; but it certainly is singular that they should find among men imitators or with women admirers. The world seems to have forgotten that manhood's beauty is in its power. It is nature's shield, though unpolished, for weakness the rough and rugged bulwark for helplessness. Fashion may, and indeed does award the palm of gentility to a graceful exterior and supple spine; to honied accents and costly dress. She takes for gentlemen the scented fops who have neither manhood capacity to protect nor woman's claim protection. And she bids her servile followers admire and imitate while, like the diamond that passes unnoticed until accident develops its value and reveals its beauty, the true gentleman is found perhaps carrying the hod or wielding the pick, demonstrating in himself that utility is beauty and usefulness true gentility. I have said nothing of that universal pride which springs from wealth, for the reason that this community is in no way addicted to this vice. Neither have I adverted to any of those seductive peculiarities which characterize the fairer portion of our community, but, if ancient chroniclers can be believed and birds be judged by their feathers, the fair sex of to-day are very different from the women of a century since. Gallantry constrains us to admit this change an improvement and stern necessity compels us to acquiesce in it; but this subject at its present phase is too broad for this lecture and too delicate for this lecturer. To conclude this review of the world and the history of men we can but wonder at the sacrifices offered to mere ostentation and pretention. From the cradle to the grave is one continued struggle of vanity—the exhibition of what we have not. Nor does this folly end with life. In all probability a lying tombstone credits us with virtues of which we never dreamed. But while there is so much in humanity to ridicule and even more to deplore, we have also just grounds for gratulation. We build no pyramids, but we cover the earth with railroads and canals; nor, like the Venetian Doge, do we wed some trifling sea with regal ceremony and religious rite, but with the aid of science we unite continents and bridge seas with our commerce, while by another and greater achievement unknown to antiquity we have equalized humanity, not by degrading the noble but by elevating the masses and raising the lowly to the full stature and dignity of man. Heroes and patriots too we have, nobler than ever sculptured marble named. Our own state has sacrificed a hecatomb of nobler men than graced Thermopylae. Let him who deems the age of chivalry past remember our brethren who found in the "Central America" a watery grave. Let history tell how manhood in its strength was self-sacrificed for helplessness and infancy. Her records show no nobler victims than the four hundred who sent from them the feeble woman and the helpless child and within their coffin and above their grave met, men as they were, the "Grizzly King." Peace to their ashes. Peace with the gems of the ocean. They sleep, these jewels of our state, and a mighty chorister—the waves of the sleepless sea shall chant their requiem in eternal melody. Such monuments as these which we build for ourselves time cannot shake.

If, in the place of striving to astonish and dazzle, we would endeavor to enlighten and advance ourselves and mankind, we would secure the only fame worth possessing. The impulse of our example upon our own day and generation could not die with us. It would deepen with coming time and widen with gathering centuries, and when the frills and follies of our race are melted into air and, "like the baseless fabric of a dream, the cloud-capped tours, the gorgeous palaces, the

solemn temples, yea, the great globe itself and all which it inherits shall dissolve and like an unsubstantial pageant, leave not a trace behind," the footprints of our progress may remain stamped in the indelible character of manhood in another and higher sphere.

OBSEQUIES OF PRESIDENT LINCOLN.

(AN ORATION DELIVERED IN NEVADA CITY IN 1865.)

FELLOW CITIZENS: It has been well said that revolutions do not retrace their steps—never go backward—and most fully has this saying been verified in the political revolution that for the last four years, with unparalleled majesty and augmenting force, has swept over this land; that with changing opinions has wrecked alike the cherished traditions and political organizations of the past, and in the fierce furnace of civil war has melted and moulded rival sections and opposing factions into one common and united people. In its onward march it has not shrunk at the menace of foreign power; it has not faltered in the presence of defeat, nor paused at the syren voice of delusive peace: but making of the obstacles in its path new incentives to exertion, with the watchwords Freedom and Union upon its banners, the great revolution, as deep as the sea, as resistless as the ocean tides, has borne America and her destinies onward, in majestic progress, to her present high and secure position. Over the myriad graves of her unnamed heroes she has not paused in idle lamentation, but pressing forward has raised their monument with a reconstructed Nation, and secured their fame and enshrined their memory in the gratitude of the future generations.

But to-day, with victory upon all her banners and triumph through all her borders, the Nation may well pause by the ashes of the noblest of her murdered sons; and America, all radiant with the splendor of past achievements—thrice resplendent in the bright dawning of prospective peace—may well shroud herself in the sable habiliments of woe, and give one short, sad day of the Nation's life, to the memory of the man who gave his life for the Nation. But in this her hour of mourning she takes no backward step. Within the cloud that enshrouds the land the revolution still ripens, the tempest slumbers and the lightning sleeps. Let those whose parricidal hands have spread this pall over the Nation's joys and hopes beware the bursting storm! But to-day is sacred to grief. We dedicate it to sorrow, not to wrath. To-day the Nation follows Abraham Lincoln's honored ashes as a mourner, not an avenger. In sad, yet grateful retrospect —gratitude that he has been, and sorrow that he is no more—she recalls his many virtues, and enshrines him forever in the Nation's memory.

What was Abraham Lincoln to us, or to the world, that to-day at every hearthstone throughout the land, from lordly mansion to squalid hovel, there is mourning and lamentation, as though in each its first-born lay dead? By what strange magic has this man so possessed the hearts of this people, that to-day each mourns his loss as though with him we buried a cherished brother?—that without him to share the triumph, the glories of the past grow dim, and the hope, of the future dark and doubtful?

That we may properly estimate our own loss, that we may do justice to the memory of the illustrious dead, we shall briefly review the career of Abraham Lincoln, and show that his own great deeds, the task of his life, the work of his own hands, has raised to his name and fame a monument more lofty and enduring than the Pyramids; and that while the truth and the rights eternal as their Author, shall endure, foremost on their bright heraldry his fame is secured forever.

Abraham Lincoln was peculiarly the man of the people. Debarred in early life those advantages which fortune bestows upon her more favored children, untrained in the scholastic subtleties of the schools, unpracticed in the polished dissimulations of courts, the stalwart woodsman of the frontier brought to the battle of life little save an energy that never slackened and an integrity that never swerved. Uncouth and unpolished, he entered the arena of intellectual strife with giants for his competitors, and distanced all his rivals, reaching the very pinnacle of national honor and preferment, with his name a household word for honesty and integrity. The champion of the oppressed when the oppressor was all-powerful; the advocate of freedom when slavery was the worshipped idol; fearless in his weakness, magnanimous in his strength; it was well for the country and well for humanity that such a man thus spotless and self-reliant, thus fearless and merciful, was called to the Chair of Washington. Treason and Imbecility had preceded him there; Rebellion and Assassination welcomed him to his high position. The ashes of Washington were trodden by the feet of traitors and the armed hosts of treason menaced the National Capital. The nation's emblem was trampled in the mire, and its defenders sealed their

devotion with their blood. Over the whole land lowered one dark cloud, lightened but by the lurid flames of civil war. With a betrayed country, a bankrupt treasury and a distracted nation, Abraham Lincoln assumed as its Chief Executive, the reins and the relics of power, and like another Moses stood between the people and the destruction that threatened the land; and the plague was stayed.

He kindled the patriotism of the loyal States, till the north was one blaze of enthusiasm; and the gray-haired veterans of former wars and beardless youths answered to his call until the nations of the earth looked on aghast at this uprising of a great people. He fashioned its wild zeal into disciplined valor, and a million armed men in martial array attested the hand of the master. He unloosed the frozen springs of trade, and at his bidding public credit rose from the dead. The country woke from its stupor, and the insurrection that had marshalled its hosts for Northern fields of plunder, halted dismayed. While the crowned robbers of Europe, exultant over our downfall, and hastening to rehearse the partition of Poland with the fragments of the great American Republic, deferred their schemes of plunder to a more auspicious occasion. For four years, with Lincoln at the helm, the Republic struggled on through the varying fortunes of war, through the tangled wiles of diplomacy with secret, treacherous foes, and doubting, fearful friends, with discredited generals, depleted armies, disordered finances—four years of such toil, such exertion and such sacrifices as earth, with all her blood-stained heroes, had never witnessed—undismayed by disaster, he organized victory in the very jaws of defeat, and infused his own indomitable confidence when all else despaired. Careless of his own fame but watchful for the public interests, he removed from exalted positions the idols of the people when he found them wanting—and taught the soldiers that led the armies of the Nation, that success was with him the gauge of merit. Diplomacy sneered at the rough speech and homely exterior of the backwoods President, and fastidious critics questioned his literary taste and cavilled at his Messages; but the people to whom he spoke, for whom he acted, needed no interpreter for the President's language nor for his deeds. They knew that with the burden of an empire on his mind, Abraham Lincoln shared with them all their sorrows and sympathized with all their griefs; and when some white-haired father or aged mother made a weary pilgrimage to Washington to learn from the President of their boy starving in some Southern dungeon, and they looked on his sad and care-worn face, and listened to his words of comfort and of cheer, they felt their own sorrows lightened and their griefs assuaged by the kind sympathy of their President. The man of the people in the White House as on the frontier, he raised them up and kept them with himself by the irresistible magnetism of an honest purpose and a heartfelt sympathy. He was spared to us to see star after star of our constellation return from its wild wanderings, ere his own should be lost in the brightness of the coming day—to see that the evils that menaced his loved country were past. The second Father of his Country, the hero in disaster, merciful in victory, a martyr in triumph, like Israel's Law-giver, to him it was given to lead his people through the Red Sea of conflict, and the wilderness of suffering, but to find his own grave at the very gates of the promised land, which he was indeed suffered to behold but not permitted to enter.

His mission accomplished——

> " It came, his hour of martyrdom
> In Freedom's sacred cause has come.
> And though his life hath passed away
> Like lightning on a stormy day,
> Yet shall his death hour leave a track
> Of glory permanent and bright,
> To which the brave of after times,
> The suffering brave, shall long look back
> With proud regret; and by its light
> Watch through the hours of Slavery's night
> For vengeance on the oppressor's crimes."

The Emancipation Proclamation we scarce appreciate. It has revolutionized the whole social system of the country—I might say of the world. Slavery with its baneful and poisonous influences, had twined itself about all the institutions of the land. For over half a century four millions of slaves and twenty millions of blind, abject worshippers of slavery had dragged this hideous Juggernaut in triumph over a people that boasted their freedom. The pulpit attested its Divine origin; venerable jurists affirmed its legality; moralists maintained its purity, and even those who recognized its infamies were the ready apologists for its crimes, until this monster, begotten of avarice and indolence, and itself the fruitful parent of lust, violence and all iniquity, well nigh ruled the land. In the national councils its voice was supreme, and State legislation conformed itself to its slightest caprice. It closed the avenues of instruction to the negro in States where slavery was never known, and hunted its hapless victims wherever American soil offered the fugitive shelter or rest. When the South had no more to ask for this her cherished bantling, and the North could concede no more, slavery resolved to ruin where it could no longer rule; and with armed rebellion at the South and cowardly traitors at the North, it threw off its disguise, showed itself the hideous monster that it really was; stabbed at the heart of a mother that had nourished it, and inaugurated the rebellion now in its death agony. The President was lenient to a fault; magnanimous, until further concessions would have been a weakness. He tendered the olive branch again and again; it was met with derision; his proffers of amnesty and pardon with contempt and scorn. At last he resolved upon a war of extermination—not against the deluded people, but against the evil spirit that had entered in and possessed them. Invoking upon this deed the judgment of posterity, he emancipated a race, and gave to Freedom a continent. The judgment of the world upon this great act is already recorded, and the generations to come have but to attest it. The Nation stands sponsor to this deed, and accepts it as her own, while policy and patriotism, justice and humanity, all, *all* approve it, and crown its great author the champion of Human Freedom, the Benefactor of the race. Henceforth there is no North, no South, with their vengeful feuds and sectional hatreds. It was slavery drew the dark and bloody line, and with the curse that created it, it has gone forever; and in this great consummation Abraham Lincoln stands forth the Regenerator as well as the Father of his rescued country. While Bunker Hill and Yorktown must divide a Nation's honor with the red fields of this great struggle, Mount Vernon must share with another hallowed shrine—with a Mecca nearing the setting sun—that homage which Freemen ever pay to the martyrs of Liberty.

And for the murderer—the wretched assassin—how little has he accomplished! How much survives his bloody work! The struggle of the nation was over; the burden and heat of the day were past; the great mission of the President well-nigh accomplished; the rebellion suppressed; slavery abolished; the Union restored, a grateful nation would have decked its hero and savior with laurel, when assassination bestowed the crown of martyrdom. To the nation and to freedom he had dedicated himself; it but remained that he should attest his fealty with his life and seal the priceless legacy with his blood—stricken down at the very moment of success, when his power to achieve was only equalled by his magnanimity of purpose.

What hand shall now restrain the sword of justice, wielded by the resistless power of the nation—what amnesty may yet be offered to the misled South—the future can alone determine. With her sword broken, her shield beaten down, her armies vanquished, her chieftains captives, her very helplessness might compel compassion and induce forgiveness; but for the system that inaugurated this war, that has filled the land with mourning and drenched it with blood, there is no oblivion, there can be no forgiveness. Upon the altar of Slavery lies our last, our purest sacrifice; and in the sorrow of to-day and the retribution of to-morrow—the altar and the idol must perish forever. It was for free men that the noblest of freemen has fallen; and the land that to-day receives the ashes of our dead is forever hallowed to freedom – a freedom in which, through the bright record of his life, the man we mourn forever lives; lives through the coming centuries of peace and prosperity, in which his country's fame shall fill the world while her commerce whitens the seas; lives in the future of a mighty nation, reunited by his efforts, cemented with his blood; lives in the gratitude of a race whose fetters he has broken and whose feet he has guided from bondage and captivity to freedom and liberty. To such a life this earth is a monument and not a sepulchre: and through the long vista of coming years the gathering ages bring new honors, humanity a deeper devotion to his name and his cherished memory. And we may thus——

"———recall his fate without a sigh,
For he is Freedom's now and fame's——
One of the few immortal names
That were not born to die."

To-day, while a weeping nation bears his honored ashes to the silent grave, while in every hamlet the nation's ensign droops in clouded sky, mute symbol of the nation's woe, while the wail of the people pierces the Heavens, and this precious blood, most foully shed, cries from the earth—go forth the funeral pageant! Let memory and grief marshal the mourning train! March first, rebellious South, close to your victim, nearest to his bier! Well may manacled crime, that shrinks from justice and hopes for mercy only, mourn our dead leader, for he was indeed merciful! The hand death palsies but half unsheathed the sword, and ever offered the olive branch of pardon; and the last utterance of the lips that death now seals was for yourselves forgiveness! Well may you weep bitter tears of remorse for the past and for the just retribution of the future! Stand forth, scarred and battled-stained veterans of a hundred bloody fields, with trailing arms and muffled drum join the sad cortege. It was for your triumphs he was slain, and in your glory he has found a grave. Your companion and leader in the hour of the nation's dread peril, it was given to him to rejoice in your triumph and welcome the peace won by your valor and victories. It was with you he passed through the dark gloom of the nation's night.

And now, soldiers, the spared heroes of our country, in the bright light of the coming day, and in the land that his constancy and your valor has redeemed, lay your comrade and chieftain to rest forever. Let woman and childhood be there to garland his honored grave; it was for them, for us that he fell—upon the altar of OUR COUNTRY that he was sacrificed. Let them mingle their tears with hers who mourns him a widow, with the orphans who lose in him a father. Let the freedman be there with his broken chain—the noblest garland that can wreathe the Liberator's tomb. Let every race and the children of every clime—the oppressed of every land—join in his obsequies; it is gratitude should awaken grief, and humanity bids them come as mourners to the tomb of the holiest martyr of Humanity.

> "Follow now as you list. The first mourner to-day
> Is the Nation whose Father is taken away.
> Wife, children and neighbor may mourn at his knell;
> He was lover and friend to his country as well.
> For the stars on our banner grow suddenly dim
> Let us weep in our darkness, but weep not for him;
> Not for him, who departing leaves millions in tears;
> Not for him, who has died full of honors and years;
> Not for him, who ascended Fame's ladder so high.
> From the round at the top he has stepped to the sky."

At a meeting called in 1866 to endorse Congress in its contest with Andrew Johnson, Mr. Belden made the following extemporaneous address:

MR. PRESIDENT, LADIES AND GENTLEMEN, FELLOW CITIZENS OF SACRAMENTO:

I am not here by my own wish nor at my own volition. I am here as a law-abiding citizen under orders of the Executive. The Governor issued his mandate and in compliance with it, here I am (laughter). What I am to say or what I am to do, after all that has been said here this evening I am at a loss to understand; but I can give you one assurance, that if I cannot be beautiful I shall at least be brief (laughter). What little I have to say I shall dispose of as speedily as may be and then leave you to the consideration of the very cogent reasons that have been here suggested. I do not see as I can do any better than give you my own experience, not as an exhorter exactly, but my experience at the Democratic meeting in San Francisco a few days since. I was there at what was termed the "great uprising when the people came together in their majesty" for the purpose of endorsing Andrew Johnson and for the purpose of condemning Congress, and I saw the whole of the sturdy uprising. There was Governor Weller (laughter), Hardy and Frank Hereford and such men, whom we have been scourging through the state for the past six years, and I heard them rise up and say that Andy Johnson was as good a Democrat as they wanted (laughter). Now we did not elect him as a Democrat for their admiration, and so since then I have spent some little time in trying to ascertain how much of a Democrat he has become, and precisely what difference there is between the Andrew Johnson they wanted and the Andrew Johnson we elected two years ago. Why, fellow citizens, the result is that the only difference I have been able to discover is, that since the time we elected him, Andrew Johnson has expressed a most profound dislike for the negro and the most fervent admiration for whiskey (great laughter). I infer from this that as good a Democrat as is wanted to-day, is a man that can heartily curse the nigger wherever he presents himself, and can carry, without wincing, about a pint of old Bourbon (renewed laughter). It is the old touchstone, the old test of Democracy in use in days past. All they required then was that a man should take his whiskey straight and quote from the Scriptures flippantly, "Cursed be Canaan, a servant of servants shall he be." That showed his orthodoxy, he was sound and he had the scriptural guarantee of it. He must be able too, to draw the Constitution for catching the helpless fugitive. If he met one of them friendless and fleeing for his liberty, he must draw the Constitution on him. A pint of whiskey in one hand and the constitutional provisions in the other, showing how the nigger could be returned to his master, was all that was required for the stock in trade of a first-class Democratic statesman of that period (laughter). Now we are evidently falling again upon these good old times. We have elected a man whom they find to possess these pre-eminent requisites, entitling him to the consideration of the old Democratic party, and the entire Democratic party adopt him and proclaim themselves the Union party of to-day. It was a little surprising to me, and would have been to you, I know, to hear these gentlemen announce their Unionism. It was certainly a very questionable indorsement to find the President sustained by such men, and I began to distrust that something was wrong when I heard Jim Hardy and old Weller praising him. I at once, imitating the Democracy by force of example, began to quote Scripture too, and said to myself, "Is Saul also among the prophets?" (laughter). These men were pointed out to me for I did not recognize them when they faced me and told of their Unionism in the past and their loyalty. But I soon learned the reason, for when they turned round to sit down, you could see the scars on their backs where we had been welting them for treason through the State of California for the last four years along with other traitors (applause). There they were, covered with scars from head to foot, like the hieroglyphics of Luxor, branded for all time; but so long as they kept their faces towards you, no scars were to be seen (laughter and cheers). I say, I question these men's loyalty somewhat; I still do question it. So much for the parties who have adopted "our President," as they are pleased to call him. So much for his special qualifications, and so much for his associates. I propose now briefly to call your attention, and it will be but mere repetition I know, to the reasons which to-day perhaps make a permanent schism between a mere man and a mighty principle, producing a dividing abyss which is destined to grow broader, deeper, more enduring than that which separated Dives in Hell from Lazarus in Abraham's bosom—between the man who sits in the White House in Washington, and the great principle which we to-day advocate and which the future will forever vindicate (applause). What is this reason and what is this principle? Why, it is that we, who elected Abraham Lincoln, of blessed memory, and Andrew Johnson of—what shall I call his memory—I say, why is it that we are to-day supporting Congress, and, by implication from that support, are censuring our President? It is simply because he is derelict to the principles upon which we elected him, and we are true to those principles as we are true to ourselves (applause). It is because, after four years of war, we have plighted our faith and pledged our word to a class of men that trusted our fealty, whom we have endowed with the boon of freedom, that we accord them protection in its enjoyment. And it is sought now to violate that sacred pledge. It was because Andrew Johnson was first and foremost and loudest in his utterance upon this question, that he stands where he does to-day, and it is because Andrew Johnson is false to himself and to us, that he stands where our judgment places him (applause). And we are told that we must follow him, that we must cling to this man rather than to the principles which he has abandoned, that we must worship the President of an accident rather than support those representatives who speak our wish and execute our will (applause). Now, sir, one word in reference to our obligations to these negroes, whose very helplessness gives them an added claim to our protection. Is there one man within the sound of my voice, or is there one woman in all this concourse, that graces and adorns this assembly, that has not, within the past four years, recalling the records of our Union fugitives that have fled through the tangled Southern swamps and the Florida everglades, tracked by fierce bloodhounds and pursued by savage men, horrible torture awaiting them should they be recaptured—who, I ask, has heard or read of these things, that did not say, "God grant this, our friend may meet a negro on his hapless road" (applause). Is there one man or woman who did not hope that some dusky friend of freedom, with the shackles yet upon his limbs, might meet and shield and aid them in their flight from that charnel-house of liberty, Andersonville, toward home and freedom and life? (applause). And is there one who did not then swear, and as God gave him strength to swear and fidelity to keep his oath, that as these negroes were true to him and to his country, so would he never desert them in their hour of peril and night, let come what would? (cheers). That oath has been recorded; it stands registered to-day in your memories and in your country's history. It stands there, engraven by those obligations that gratitude graves deeper than the chisel of sculptor, in our hearts and memories, and obligates us forever to its redemption (applause). I say to you that the government and the people that, having assumed these obligations to these men, to-day would evade them or release themselves from such obligations, are false to themselves, false to the country and false to the highest instincts of humanity. One word more in reference to the Moses, as he has been pleased to term himself, who has undertaken to lead the negro out of the house of bondage to perfect freedom. If there is any burlesque to be found in such a man calling himself Moses, it is Andrew Johnson assuming that position. He might have brought upon the land lice and frogs and all manner of unclean things, such as have cursed it for the past half century, but when he met the Red Sea his heart failed him, and when he saw the desert before him, he turned back with his fugitives and helpless wanderers who were looking to him for guidance and protection, turned back to the house of bondage and delivered them over again to oppression. He is a Moses only to lead them to more sure captivity, to deliver them into more helpless bondage. It has been asked where we shall find a leader in the future.' I say, in the past this revolution has not asked for leaders; it has made them. So will it be in the future. The spirit and the voice of the people have raised up those men whom the country demanded heretofore, and if they were false to themselves or to the country or to the principles which they had advocated, it has crushed them beneath the popular condemnation (applause). They are gone—all gone that have endeavored to stay the waves of revolution, and the man who sits in the White House and has the control of public affairs will soon find himself cast down with the dead idols and the popular and self-styled heroes of the past, which have been lost and forgotten in the progress of events. I say, if he is not the Moses who will lead the people from the house of bondage to the promised land, there will arise another. One will appear who will represent our principles. He is coming already, we feel him, we hear him, we recognize his presence in the whisperings of these assemblies that are rousing the souls of men throughout the North, surging with the sentiments and aspirations of a great and free people, that are swelling up like the tides of the sea, but will not ebb. We feel that presence and power; it is no man to betray us, no mere parasite of the popular will, asking for control of the power that would free the slave, but it is Columbia herself that is coming (cheers). It is her spirit, it is the spirit of liberty that leads us, that will stamp the seal and signet of freedom upon this whole continent; and with the old and time-honored principles of the past, with the old war-cry that rang before the walls of Jericho, "The sword of the Lord and of Gideon," she will lead this people into the promised land and dedicate it forever to freedom and free men (cheers and applause).

FOURTH OF JULY ORATION.

(Delivered in Nevada City in 1866.)

Fellow Citizens:—The speakers assigned to this occasion must find themselves embarassed, not only by the limited time allotted to each, by the mass of facts of interest that press upon their attention and demand their notice, but that a past replete with acts and crowded with deeds of the highest import, is so near, so vividly present with us, that language must be powerless to compete with deeds of our own day, or history with the realities of our own immediate experience. How feeble must the martial pageantry of to-day appear to the men who have celebrated this anniversary in the trenches before Richmond, and in the surrender of Vicksburg, to warriors who for the past four years have heralded its advent with shotted guns, and bursting shells, and all the bloody reality of civil war. By what magic shall the record of the past four years be rolled away, that we may again marshal before us, the deeds and the heroes of seventy-six! It may not be. With the remembrance of Valley Forge will rise unbidden the fever swamps of the Chickahomony, the suffering and slaughter by the blood stained Potomac. Lexington and Manasses pass before us together. Bunker Hill and Lookout Mountain will not be divided. We may well exult over the capitulation of Yorktown, that gave to the nation existence, but with a higher, a deeper, and a holier gratulation do we rejoice that the surrender of Lee secured that nation's existence forever. Do we invoke the sacred name of the Patriot, the President, the Father of his country? At our bidding he comes, but not alone. With him is another, that to all these claims upon the nation's gratitude, adds to the crown of martydom—the second Washington—Mount Vernon must share with Springfield twin shrines of freedom the homage of freemen. Forever cherished be the memories of the heroes of the war of independence. But, dim, distant and few seem their honored shades, while the present numbers its tens of thousands of scarred warriors and its martyrs by the quarter of a million. Would we depict the sacrifices of mothers, wives and sisters, who gave sons, husbands and brothers to the cause of the infant Republic—time has reaped and death garnered alike the mourned and the mourners. The suffering and the sorrow have passed away, and naught but the glory of the sacrifice remains. But to the mourners of to-day time has brought no opiate, and they may well forget the griefs of a century since, in the keen anguish of present bereavement. We would not undervalue the great event this day commemorated. We cannot belittle the past, but the mighty deeds of later days rise before us, and filling our vision, may well shut out for the time more distant scenes, as the hills that girdle our city hide from our sight the more distant though loftier snow-capped Sierras. But the claims of the fathers are not forgotten in thus honoring the sons. We pluck no leaf from the chaplet of seventy-six to deck the heroes of sixty-five; a reflected glory from the one illumines the other, and the saviours of the nation have shown themselves the worthy descendants of its founders. Although nearly a century intervened between the Revolution that gave liberty to the nation, and that which gave freedom to a race, and to a continent, the two events cannot be separated; they are but one page of that history time is ever writing; but two footprints of the nation in the century of its existence; the landmarks by which the future will note its progress and judge its course. Let us read them together; let us see what of the past they exhibit, what of the future they portend.

It has been assumed that the recognition of American independence, established, not as an abstraction, but as a practical reality, that all men were born free and equal, not only possessed of the right, but endowed with the capacity of successful self government. The issue of the first revolution accomplished neither. The new nation indeed asserted the equality of all men, but it illustrated its text by permitting and fostering the most odious system of human bondage, and flaunted alike the noble assertion and the shameless contradiction before a sneering world. While the result of the war but determined the connection with Great Britain of her colonies, and left the question of self-government, the experiment of a successful Republic to be established by the future, to the infant Republic it yet remained to demonstrate the propositions so confidently asserted, and for eighty-six years her history seemed to vindicate these principles. For eighty-six years the young Republic marched on in an unbroken career of prosperity; war but enlarged her domain, united her people and strengthened her government, while in population, resources, and enterprise, her progress placed her without a precedent, or parallel, the wonder and admiration of the world. The tests by which her strength and stability were to be measured she had borne triumphantly and but one ordeal remained, but one danger to be met and measured, she was yet to be tried in the crucible of a civil war, and here it was her friends, and the champions of Republicanism feared for her. The political teachers of the world, the traditions of the past all taught that a Republic, the most prosperous form of government in peace, the most formidable in a foreign war, was powerless against internal convulsions and helpless when its foes were those of its own household—and as in insurrection the Republic had its beginning, so in insurrection they predicted its early and its certain end. But the hour of her final trial, of her final triumph came; slavery, the serpent that was with her in her cradle, had become the Hydra she must crush in her strength or perish in its poisonous folds. The struggle is over, the contest is ended, the nation scarred, bleeding and torn, is the victor; but why should I dwell on the contest so recent; why picture the storm while the cloud yet lowers on our horizon, slavery and secession, its twin sister, have perished; they shall know no resurrection—the Union lives, may its days be eternal. Nor has the contest ended with our deliverance alone; the thunder of our strife has aroused a people beyond the sea. Erin kindles anew her torch at the beacon of American liberty, and struggles with the same fetters that America ninety years since burst asunder. God hasten the day when the Irish Republic shall keep the natal day of her deliverance when the green flag of the Fenians shall float over a nation as free as its people are brave. Well may the lovers of liberty rejoice over the issue of this fearful struggle, the result of a great experiment, for never was human government thus tested, never the vitality, the power of a State, thus triumphantly vindicated. With the continent one vast camp, with a million of men in arms, with anarchy and despotism upon either hand, the Republic passed unscathed amid them all; disaster and defeat, hatred abroad and insubordination at home, the fierce heats of a Presidential election, the dread chill of a President's assassination, these, all these, and far more were the fearful elements of that cloud and storm, through which the genius of Columbia has led up her children. She comes to us to-day with saddened memories for the past, but bright hopes for the future, not with crashing cannon and panoply of steel, but by her side the angel of peace, she sounds to-day through all her ancient domain. From the pine-clad forests of Maine to the palm-fringed savannahs of the Gulf, the clarion notes that ninety years ago pealed forth from Independence Hall, proclaim freedom to all the land, and to all the inhabitants thereof, she speaks and her voice is law, her mandate to-day is freedom forever. And to-day she sends forth new hosts for the final subjugation of the South, to bind them with bonds that shall never be broken, not with parchment scroll or paper compact, not with the keen logic of the sword or the stern voice of the cannon, does she bind anew these States, but with the legions of free labor, their swords beaten into plough-shares, their spears into pruning-hooks, with the strong links of trade and the potent bands of mutual interest, she is welding to each other and to her. Welcome, thrice welcome bright spirit of American liberty, guide of the fathers and shield of the sons, the people thou has led through the wilderness and the sea, on this thy day in the promised land of Freedom, renew their fealty and allegiance to thee.

Fold the broad banner stripes over her breast,
Crown her with star jewels, queen of the West;
Earth for her heritage, God for her friend,
She shall reign over us world without end.

An amusing incident which occurred at this time and during one of the political campaigns is here noted:

Belden was engaged at the time in stumping a portion of the State, and having nearly completed his circuit, was due in the city on the day of the meeting. After travelling all day by stage, he arrived late in the evening, in Sacramento, stained with travel and bearing all the evidences of a long and disagreeable journey. Being very late, he made no delay, but, alighting from the stage, hurriedly entered the hall and forced himself through the crowd and towards the front. The meeting had been called to order some time before and the audience, having listened to the political platitudes of several dry and prosy speakers, had become restless and began to call for Belden. As the latter began to ascend the steps of the platform, a man who had been stationed there to warn off intruders, caught him by the arm and pulled him down, exclaiming:—"Here, you can't go up there." "Why not?" said the Judge. "Because," said the other, "we can't have every d—d loafer in town sitting on the platform." Belden was much amused and attempted to argue the question with him but to no avail. Finally, as time pressed and the crowd was becoming more impatient, he said:—"How am I going to make a speech if you don't let me go up?" The fellow in great astonishment, took another and more careful look at the speaker and exclaimed:—"Who the d— are you, anyway?" "I'm Dave Belden that the boys are shouting for," replied the shabby appearing stranger. The man was utterly confounded by the discovery and at once resigned his position in disgust. The one so anxiously awaited then ascended to the platform, and, having been introduced by the chairman, delivered a speech which was the great feature of the occasion and one long remembered by his audience, though no copy of the same is at present attainable.

Mr. Belden was married April 29th, 1861, to Miss Elizabeth Farrell, a highly cultured and refined lady, a native of New Jersey, who survives him.

In 1865 he was elected to the State Senate from Nevada County. He served as Senator four years and the impression that he made on the policy of the State is still visible. He was first a member of the Judiciary Committee, and afterwards its Chairman, and was moreover, the acknowledged leader of the Senate irrespective of party.

The proceedings of both sessions of the Legislature, so far as Judge Belden's work therein is concerned, are here given.

CHAPTER II.

THE sixteenth session of the California Legislature of the upper house, of which Mr. Belden had been elected a member, convened on the 4th day of December, 1865. The Senate was composed of the following gentlemen, nearly all of whom were at that time, or have since become, prominent in the history of the State:—

HOLD OVER MEMBERS.

F. M. Smith, Representing Butte and Plumas Counties.
W. H. Leonard, Calaveras.
John A. Rush, Colusa and Tehama.
Charles B. Parker, Contra Costa and Marin.
S. P. Wright, Del Norte, Humboldt and Klamath.
F. L. Maddox, Eldorado.
W. S. Montgomery, Mariposa, Merced and Stanislaus.
Geo. S. Evans, Mono and Tuolumne.
Chancellor Hartson, Napa, Lake and Mendocino.
Joseph Kutz, Nevada.
James E. Hale, Placer.
J. E. Benton, Sacramento.
M. C. Tuttle, San Bernardino and San Diego.
H. L. Dodge and Horace Hawes, San Francisco and San Mateo.
Samuel Myers, San Joaquin.
William E. Lovett, Santa Cruz.
John P. Jones, Shasta and Trinity.
Lewis Cunningham, Sutter and Yuba.

NEWLY ELECTED MEMBERS.

Henry Robinson, Alameda, Alpine and Amador.
Seneca Ewer, Butte and Plumas.
Thomas Hardy, Calaveras.
James Johnson, Eldorado.
J. W. Freeman, Fresno and Tulare.
P. Banning, Los Angeles.
Oliver Wolcott, Mono and Tuolumne.
David Belden, Nevada.
E. L. Bradley, Placer.
E. H. Heacock, Sacramento.
A. L. Tubbs, }
Wm. J. Shaw, } San Francisco and San Mateo.
John S. Hager, }

P. W. Murphy, Santa Barbara and San Luis Obispo.
Wm. J. Knox, Santa Clara.
L. E. Pratt, Sierra.
E. Wadsworth, Siskiyou.
L. B. Mizner, Solano and Yolo.
Geo. Pearce, Sonoma.
E. Teegarden, Sutter and Yuba.

The presiding officer of the Senate was T. B. Machin, Lieutenant-Governor of the State.

This was the first session of the Legislature since the termination of the Civil War, and had to deal with the proposed amendments to the Federal Constitution, as well as with many local questions arising from the complications of those times. The Democratic members had sympathized deeply with the South during the rebellion, and were now very reluctant to accept the situation. Many of them were determined to throw all obstacles in the way of the reconstruction policy of Congress, and quite a number of them looked upon Union members as personal enemies. This feeling on national questions rendered it very difficult to harmonize the Legislature on state affairs, and had it not been for the wise counsels of such men as David Belden, John P. Jones, Chancellor Hartson and others, unfortunate results might have ensued.

One incident will indicate the temper of the sympathizers with the "Lost Cause," and the skill with which the leaders of the Union party neutralized their efforts to bring about a collision. In the very first days of the session a fire-eating member of the Assembly introduced a resolution calling upon the Governor to make a detailed statement of the purpose for which the moneys appropriated for the use of the Secret Service Fund during his administration had been expended. This resolution placed the Governor in a very embarrassing position. If he refused to make the statement it would be claimed that he had misappropriated the funds; while, if he complied with the resolution, he would break faith with and expose to great personal danger many worthy citizens, who, for the sake of preserving California to the Union, had engaged in services of the greatest peril. These men had joined the many secret societies organized by the rebels for the purpose of capturing the State, and it was through information given by them that the Governor had been able to render these efforts abortive and preserve tranquility to the Commonwealth during the great struggle. To reveal the names of these men and the work they had performed would be to repay devotion with ingratitude, and to drive them from the state for which they had made great sacrifices. Mr. Belden knew that many members of the assembly had participated in the plots of the "Knights of the Golden Circle" and kindred organizations, and that the resolution had been presented for the purpose of ascertaining to whom they owed the exposure of their treasonable plans. Some of these assemblymen were already prominent in political circles and were ambitious for future preferment. On the evening of the day on which the resolution was presented, he dropped into the hotel where the Southern members were in the habit of congregating and found them discussing the question as to what course the Governor would pursue in the matter. Joining one of the groups he was asked whether or not he thought the Governor would make the statement asked for. "Oh yes," said Mr. Belden, "I have just come from Governor Lowe's chambers, and the report is nearly completed. It will be exceedingly interesting reading, not only for the members of the Legislature, but for their constituents. You know that nearly all of the Secret Service Fund was expended for the purpose of keeping the Executive informed of the movements of those who were endeavoring to turn the state over to the Confederacy. The Governor has a complete record of the part taken by prominent men in this treasonable endeavor, and this record will be made part of his report. I looked over the record and found many familiar names, and many of you gentlemen will have achieved a state-wide reputation when that report comes in." This was a new aspect of the matter, and created the greatest consternation. Some of the members had secretly aided the rebellion and feared exposure. The result was that the next morning as soon as the assembly was called to order, the author of the resolution asked leave to withdraw it from the files, and was allowed that privilege. In speaking of this incident in after years, Judge Belden said that during the remainder of the session the Southern wing of the Legislature took great care in fooling with resolutions to first ascertain whether or not they were loaded.

Mr. Belden was appointed a member of the Judiciary Committee, and of the Committee on Public Expenditures. His colleagues state that he was never absent from a meeting of these committees. It was at this session of the Legislature that he first met John P. Jones, who represented Shasta and Trinity Counties in the Senate. The acquaintance soon ripened into a friendship that continued through Mr. Belden's life. When Mr. Jones was elected United States Senator from the State of Nevada he had no particular reputation for statesmanship, and was prominent only as a successful miner. This point was being discussed in Judge Belden's presence one day, when he remarked:—"Gentlemen, you don't know John P. Jones, but you will be better acquainted with him after he gets to Washington." Soon after this came Mr. Jones' great "Silver Speech," which commanded the attention of the nation, and fixed the policy of the government.

Senator Jones always had the highest admiration for Judge Belden's abilities, and many times endeavored to induce him to step up to the position in the nation which rightfully belonged to him.

The first legislative act of Mr. Belden was in aid of the then paramount interest of the State, and took the form of a memorial to Congress. In presenting these resolutions Mr. Belden made the following explanation:—

By the Act of Congress of 1862 the Central Pacific Railroad Company received certain privileges to aid in the construction of a railroad from California to the Missouri River. By this act, certain lands lying along the line were donated to the Company, embracing an area of ten miles upon each side of the road. From the grant, Congress, in this act, excepted certain mineral and other lands, which were, however, rather inaptly designated. The act also provided that Congress might at any time alter, amend or repeal it in any particular. By the act of 1864 it was so amended as to double the grant of land to the Company, giving it an area of twenty miles on each side of the line instead of ten. There were certain other exceptions in the latter act, but as it was hastily drawn they were rather imperfectly designated, and a great many of the more important interests were improperly described. Among others were the ditch rights, the canal and water rights of that section, lands held by actual settlers, though not in accordance with the regulations of the land office, highways and other matters of that character. In fact, the language of the act was such that there was difficulty in determining what was excepted and what was granted for the purposes of the Company. As there was a great deal of misapprehension likely to arise in regard to the rights of the settlers in that section, he had introduced a memorial to Congress for their benefit. In it the attention of Congress and the land office was called to the objectionable features in the Act of Congress. Our representatives were requested by the resolution to ask a suspension of the operations of the land office, that no patents should be issued until a provision should be incorporated into the Railroad Act doing away with the objectionable features referred to.

The resolutions and memorial both written by Mr. Belden were as follows:

Whereas it is proposed that the Legislature of the State of California do memorialize the Congress of the United States touching certain amendments to the Act of Congress donating lands to the Central Pacific Railroad Company, approved July the 2nd, 1864; and whereas, pending the consideration of said memorial, there is danger that patents to public lands may issue to said railroad company, and other action be had defeating the object of said proposed amendment, by the office of the United States Land Commissioner at Washington; therefore, *Resolved*, by the Senate, the Assembly concurring, that our Senators in Congress be instructed and our Representatives be requested, to use all due efforts to prevent the issue of any patents to said donated lands until said memorial shall be received and duly acted upon by the Congress of the United States.

Resolved, That a copy of these resolutions be forwarded to our Senators and Representatives in Congress, and also to the Commissioner of the United States Land Office at Washington.

The memorial of the Legislature of the State of California respectfully represents that:

Whereas, an Act of the Congress of the United States, entitled "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other Purposes," approved, July 1st, 1862—did grant to certain corporations and especially to the Central Pacific Railroad Company of California, certain rights and privileges and powers for the purpose of aiding in the construction of certain railroads therein designated—said act further donating to the said Central Pacific Railroad Company, upon certain conditions, certain public lands adjoining the line of said road, and reserving from said lands thus donated, mineral lands and certain other rights and claims therein specially excepted; and, whereas, said act did further provide that Congress might at any time alter, amend or repeal said act; and whereas, the Congress of the United States by an amendment of section 3 of said original act, approved July the 2nd, 1864, increased the amount of said land in said original act donated, and did further, by said amendatory act, reserve from said donated lands, all mineral lands excepting those containing coal and iron, and did further provide that said lands thus donated should not affect or impair any pre-emption, homestead, swamp or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands; and did further, that certain of said accepted rights should be determined by rules to be established by commissioners of the General Land Office, in conformity with the provisions of the pre-emption laws; and whereas, the line of the said Central Pacific Railroad passes through a populous section of the state, and through counties principally mineral in their character, and where large tracts land have been located, and are now occupied by bona fide settlers under and in accordance with the laws of this state; and it further appearing probable that in the greater part of such donated lands as lie within the several counties of El Dorado, Placer, Nevada and Sierra, valuable mines of gold and silver exist, that are as yet undeveloped and undiscovered; Therefore, to the end that full force and effect may be given to the several reservations from said donated lands, and that the just rights of miners and bona fide occupants of such public lands may be fully secured, we do request that section 4 of said act of July 2nd, 1864, be further amended by providing therein:—that the improvements of any bona fide settler shall be deemed to include such improved lands as are now and were at the date of the location of said line of road actually occupied and improved by bona fide settlers in accordance with the laws of the State of California, and such other lands as have been and still are peaceably and actually occupied and possessed for any and every lawful and beneficial purpose, to the extent of one hundred and sixty acres to each occupant; such provision to be made by such an amendment as shall enable such settler to purchase such improved lands from said railroad company by paying therefor the government price of $1.25 per acre; And that said act be further amended so as to secure to all water, ditch and canal companies now in active operation, all water rights and privileges by them now held and used, together with the right of way for such water ditches and canals over and through said donated lands; and also to secure to all persons therein interested all rights, privileges, franchises and leasements now held, used or enjoyed upon said donated lands, or upon the line of said road, within the four hundred feet over which the right of way by said act is given to said railroad company; and for the better ascertainment of the character of said land, whether agricultural or mineral, within the counties heretofore named, that said act be further amended to provide that the President of the United States shall appoint a Special Commissioner to reside within the State of California, whose duty it shall be to make inquiry and examination as to the mineral or agricultural character of said donated lands, such examination to be made by sub-divisions of one section each; and whenever the Commissioner shall deem it probable that such section contains valuable mines of gold and silver, though the same be then undeveloped and undiscovered, he shall report the same as mineral land.

The object of this memorial was to enable all settlers along the line of the railroad to procure titles from the company upon the payment of the government price of $1.25 or $2.50 per acre; that they should have the same right to acquire title by purchase as they would have had had the railroad never been projected. The memorial met with considerable opposition from the railroad company, but Mr. Belden succeeded in accomplishing its adoption, substantially as presented.

In discussing the memorial Mr. Belden said:—

I agree with the Senator from Placer (Mr. Hale), that it is a duty of a representative to represent the interests and not the prejudices of his constituents. Having the honor to represent in part the interests affected by this memorial, and having an acquaintance of fourteen years with them, I deem it my duty to give the result of that experience. The question prepared by the gentleman is not a new one. It has been discussed in every mining camp for fourteen years, and the universal opinion arrived at by those interested is, that the mineral lands should not be sold. I cannot speak, of course, for Placer County, but I know that in Nevada, my own county, nineteen-twentieths of the population are of that opinion. The gentleman has stated that ten years ago the miners were prosperous, while now they are impoverished, and maintains that the lack of secure titles is the cause of the decline. I would tell the gentleman that the question of titles had nothing to do with it. At the time of the greatest prosperity and the highest rates of interest that question was never referred to. The only questions that ever were asked were: Have you a good title according to mining regulations? And is the mine itself of value? These were the only conditions which affected the influx of capital. The cause of the decline is partly in the nature of mining itself, which is illustrated by the experience of all ages and places. Take, for example, South America and Mexico, where opulent cities have declined because the mines which have supported them had failed. So it will be here. Mines will be exhausted and be deserted, not because of any lack of confidence in the title, but because of the lack of gold. The proper course to pursue is to keep open the path of the prospector, and thus pave the way for new discoveries. All that the miners' convention—which fully represents the mining interests of the state—desires, is a little plain legislation in regard to the mining customs and regulations; any attempt to dispose of mineral lands will only have the effect to place large tracts in the hands of capitalists, who will work them by any kind of labor they see fit.

A few days later he voted against the bill to authorize the Board of Supervisors of Napa County to subscribe to the capital stock of the Napa

Valley Railroad Company, being opposed to the taxation of the people in aid of private enterprises.

A bill was introduced governing evidence in criminal cases in which it was provided that where the husband was accused the wife should be a competent witness, and where the wife was accused the husband should be a competent witness, with a proviso added, that neither party should be compelled to testify against his or her consent. In supporting this measure, Mr. Belden said he was in favor of the bill because it was in accordance with that spirit of modern progress which had met the approbation of the wisest jurist, and the tendency of which was to remove all unreasonable barriers to placing the truth in evidence. By our laws the marriage relation was not a mere partnership, but a civil contract. If a husband chose to make his wife a confidant of a crime he had committed, he knew of no good reason why that confidence should be protected, and he would rather provide that the wife should remain in ignorance of his guilt. The cases would be rare where the wife would be called upon to testify against her husband, and the spectacle would be so unnatural and revolting to the sense of any jury, that they would scrutinize her testimony with the utmost caution. As for the claim that the amendment should be rejected because of being an innovation upon the common law, every advance in jurisprudence had been such an innovation, and the same objections were urged two years ago against allowing parties interested to become witnesses in civil cases. That experiment is not a new one. It had been tried in England, where it had worked well, and no more cases of perjury had occurred than under the old law. There was no more liability to perjury from family affection than from interest. For one, he was willing that the experiment should be tried, and had full confidence in the result.

The Registry Act was passed at this session, and was strenuously opposed by the Democracy. Mr. Montgomery said that all knew that the bill was aimed directly at the Democratic party. He gave warning that if they passed this bill the Specific Contract Bill should never see daylight again. "Give us this Registry Bill," said he, "and we will pay you in greenbacks."

To this threat Mr. Belden replied:—

> I had proposed to say something in behalf of the Democratic party, of which I was once a member in the days of its strength and integrity. I had supposed that Democrats would not be found trading votes on questions of right for the sake of procuring some little revenge. But when a member of that party, who boasts of his past allegiance, makes use of such language and attempts to influence the Senate, either by threats or blandishments, I will say that for one, I am alike insensible and indifferent. I am unwilling to believe that the gentleman represents any party on the floor of the Senate. Such language can only be an intimation that the votes of Senators are unduly influenced—an intimation which I reject. As for myself I shall support the Registry Law upon its merits, independent of any other consideration; and when the Specific Contract Act comes up I shall vote upon it in obedience to my convictions of duty, as I have sworn to do when I took the oath of office at the beginning of the session.

It was the custom in the Legislature to leave local matters to the representatives of the community for which the legislation was sought. While Mr. Beldon seldom interfered in these matters he always took pains to inform himself of the merits of every question. Thus when the bill came up levying a special tax of fifteen cents on the dollar for improving Tenth Street and the City Cemetery in Sacramento, Mr. Belden said his attention had been called to the bill by an editorial in the *Union*. It seemed to him to be of somewhat doubtful propriety and he would like to have an explanation of its provisions. Senator Heacock explained that he had a petition representing four-fifths of the taxable property of Sacramento asking that the bill pass; to which Mr. Belden replied:

> I am glad to hear the Senator state that the bill meets the approbation of so large a portion of the citizens of Sacramento, but, at the same time, the objection urged in the article in the *Union* has not been answered. It is very likely that four-fifths of that population might desire to improve a certain avenue at the expense of the other fifth. It is very likely that four-fifths may desire to improve a cemetery in which they are directly interested, but it seems to me a manifest injustice to tax for that burial ground the other fifth who are excluded by their religion from that burial place. There would not be so much objection to the improvement of the street in question if it was one of the main thoroughfares leading to the country, for, in that case, by increasing the commercial advantage of the city, it would be a benefit to all persons alike. The street in question is not of such a character, but simply one of a number having equal claim upon the taxable property. Admit the principle that four-fifths of the people can tax the other fifth for their own exclusive benefit, and at some future time two-thirds might tax the other third in the same manner. That is the effect of the bill as it appears to me.

He strenuously supported the bill prohibiting the carrying of concealed weapons, and voted against striking out the clause which authorized policemen to search any person whom from their acts, language or reliable information, they might suspect of carrying concealed weapons.

Probably the most important measure introduced during this session was the bill for the repeal of what was known as the "Specific Contract Law." This was a law passed by a former legislature, to enforce payment of debts in coin when a contract had been made to that effect. Thus greenbacks became a legal tender only when the kind of money was not specified in the contract. It was by reason of this law that paper money never obtained circulation in California. A bill having been introduced to repeal this law, a motion was made to strike out the enacting clause. Speaking to this motion Mr. Belden said:—

> I would have preferred that my vote should indicate my views upon this question, and not to have further detained senators who have given this subject as mature consideration as myself; but as discussion seems to be the order of the day, I will, as briefly as possible, present those considerations that have convinced my judgment and will determine my vote. It is with pleasure that I have listened to the able and ingenious argument of the Senator from Butte. His past advocacy of the proposed change in our statute law; the fact that time and enlarged observation had but developed his convictions, and the loftiest patriotism stimulated his zeal; these, and the acknowledged ability of the gentleman, are the welcome guarantees that his side of the question will be fully presented and exhaustively discussed. Should his argument fail to convince the judgment of the Senate, it must fail from the inherent weakness of the cause itself and not from the inefficiency of the able and zealous advocate. But while I award to the honorable Senator the full meed of praise which his ability and research merit, I must, for my associates in this body and myself, emphatically disclaim the intimation with which the Senator opened his speach, that the fate of this bill, or of any measure before this body, is a question of external power. I know of no method in which power, however wielded, can enter into or influence the deliberations of the Senate. We are here to consider the welfare of the people and pass, perhaps, upon the merits of conflicting interests. We are not here to measure the strength of faction or to gauge the potency of rival interests. If this remark of the Senator means anything, it is an aspersion upon this body which it does not merit, and I would be slow to believe it was so intended by the honorable gentleman

himself; but while the power or influence bearing upon this question can have nothing to do with our action here, the magnitude of the results must be kept in mind, not to control or affect our action, but to secure for the subject itself that full consideration which its importance demands. The argument that the Specific Contract Act is unconstitutional has been met and fully answered by the Supreme Court of our State—a tribunal, the integrity and capacity of whose members place this decision, the result of anxious deliberation, beyond cavil or question. With their endorsement of the constitutionality I may content myself, even though the Senator from Butte shall dissent. But, as the Senator from Sonoma, Mr. Pearce, has been pleased to suggest that the constitutionality of the act, making treasury notes a legal tender, is involved in this discussion, it may be well to direct some attention to that branch of the subject. There is a very high authority, of a former day as well as the present time, which positively denies any power in Congress to make paper legal tender. To this point the language of Webster, the ablest of the constitutional expounders, is positive and unequivocal—language uttered, too, at a session of peace, when there was nothing to warp his judgment, even if his powerful mind could have been swerved from its logical deductions. The extract quoted shows that, in the opinion of Webster, Congress has no right to make a paper currency a legal tender for the payment of all debts. And to the same effect, at the present day, the Secretary of the Treasury, Mr. McCulloch, in language as unmistakable as that of Webster, declares that the authority of Congress to issue obligations for a circulating medium as money, and to make these obligations a legal tender, can only be found in the unwritten law which sanctions whatever the representatives of the people, whose duty it is to maintain the Government against its enemies, may consider, in great emergency, necessary to be done, but to issue government obligations and make them by statute a legal tender for all debts public and private, is not believed to be, under ordinary circumstances, within the scope of their duties or constitutional powers. To issue notes as money is neither expressly given to Congress by the Constitution, nor fairly to be inferred, except as a measure of necessity in a great national exigency. Such is to-day the emphatic language of the head of the financial department of the government, and whatever differences of opinion between interpreters of the Constitution as to the right of Congress to make treasury notes a legal tender, the patriotism and loyalty of the country has fully accepted the Secretary's construction. It has recognized the great national exigency before which the country trembles, and by which the Constitution was construed. It read as part of the fundamental law of the land, that half the continent was gliding from beneath our feet, that the nation was but one camp and her citizens but two hostile armies. By the lurid flames of a civil war, such as the world had never witnessed, it read all this as part of the Constitution, as the great unwritten law that, under the name of necessity, asserted its own supremacy and sway by virtue of the will of an imperilled people. That necessity, imperious and unavoidable, under which Congress acted, has been fully recognized by the judiciary and sustained by the people, and must receive the approving verdict of posterity. But while every patriot thus endorsed the action of Congress, and thus sustained in its exigency, the financial power of the Government, the legislator of to-day has but the strict letter of the Constitution for his guide. The necessities of the past are no part of the law of the present. It is with the Constitution of to-day, with the conditions of the present that we have to deal; and unless the Specific Contract Law be obnoxious to some act of paramount constitutional legislation, it may well be asked, why should it give way to a questionable act of Congressional authority. Very many of the considerations that have here to-day been urged against the retention of the Specific Contract Act have lost their force by the successes of the Union armies and the complete re-establishment of the Union. Two years ago, when the issue of our great contest seemed doubtful, when military disasters in the field, and financial embarrassments prevailed, a discreditable currency, open enemies and doubtful friends were questioning the future of this great republic, a patriot might well look with distrust and disfavor upon a measure of state policy, which even indirectly tended to discredit the national finances and embarrass the action of the Federal Government. To-day, all is changed; the millions of men then in arms have resumed the vocations of peace. The financial condition of the country has been too thoroughly tried and established to be again shaken or even questioned. The country has emerged from this great struggle, not indeed unscathed, and the scars that attest it are proofs of her wondrous vitality. Nor need California fear from the comparison of her past four years' record with that of her elder sisters of the loyal States. Distant, indeed, from the scenes of actual war, her sons maintained her honor upon every battle-field of the nation, while her bounties were one-third of all the charities that patriotic liberality bestowed upon the Sanitary Commission.

It mattered not that her fields were parched by the droughts of summer or swept by the floods of winter; that the enterprise of the miner and the industry of the farmer were alike paralyzed by unpropitious seasons; the golden stream of her charities knew no drought, but flowed in one unbroken current from the Golden Gate to the shores of the Potomac until the scourge of the war was past and her bounty was no longer required. The citizen of California may well be proud of the record of his State. When the Senator from Butte shall drop the advocate in the citizen, no member of this body will be swifter than himself to reject and repudiate the unjust comparison he has been pleased to draw between the State of California and that fire-brand of the Union—the State of South Carolina.

The argument of the Senator is based upon the assumption, that under the operation of the Specific Contract Act, the City of San Francisco has increased in wealth and the rest of the State has deteriorated. If it can be shown that the cause assigned is not the true cause, but that we must look elsewhere for the reasons for such a state of things, the argument will fall to the ground. Before 1861, when the legal tender notes were introduced, the people of the mining countries had lost confidence in the security offered for the investment of capital, and all went to San Francisco as offering the best field for its investment, and figures will show such to have been the case. San Francisco also owes her prosperity to her situation. She has the best harbor on the Pacific Coast, and the history of the world shows that where commercial advantages are by nature, there commerce and subsequent wealth always centre. The gentleman has asserted that San Francisco has derived much of her profits from rates of exchange. Were this so, she should have been most prosperous when the difference between gold and legal tenders was the greatest. A reference to her assessment rolls proves the contrary. In 1861, when gold was but 133, the increase in her property was $24,000,000. In 1862 and 1863, when gold was 172, it was but $12,000,000, and in 1863 and 1864, when gold was at its highest, 285, the increase was but $2,000,000. In 1864 and 1865, when it had declined to 149, it was on the contrary $8,000,000. The same state of affairs was true in New York City, and the fact is proven by the history of the world.

Another feature of the gentleman's argument is, that by the introduction of legal tenders there will be a tendency to distribute wealth, and not leave it in the hands of a few in the City of San Francisco. That argument defeats itself; for, according to the most respectable political economists of the age, the abundance of money is regulated by supply and demand. But suppose the gentleman's argument correct; in case of the repeal of the law, what was to bring capital here? He assumes that the effect of the law is to create a monopoly in San Francisco, by which her bankers have made $100,000,000 in the last four years. Take away that monopoly, and would that fact tend to offer an inducement to capitalists to come here? Every one must see that the effect of the repeal would be to leave them exposed to hostile legislation. Another inconsistency in the gentleman's argument is that the repeal will aid the manufacturing interests of the State, whereas it must be apparent to everyone that the $100,000,000 made in San Francisco operated as a sort of protective tariff in their favor. The gentleman's argument, therefore, not only fails to establish his position, but has a directly contrary effect.

The gentleman has also stated that with the increase of capital comes a low rate of interest, and an increased rate of wages. With that assertion I do not agree, and believe that facts will sustain my opinion. As an illustration I will cite England, where more wealth is concentrated than anywhere else in the world, and yet wages there are nearly at starvation point, although the rate of interest is but five per cent. per annum. On the contrary, in the palmy days of California, with high rates of interest, wages were high. In support of this opinion I will not only appeal to history, but to the most eminent writers. Mr. Webster, writing upon a convertible currency, asserted that there must not be mere legal convertibility, but an actual convertibility, if currency was to be used without the most disastrous results. I contend, therefore, that our national currency, not being actually convertible, is not of a beneficial tendency, and I quote from the reports of the Secretary of the Treasury, and the message of the President of the United States, to show that they have seen the evils of an irredeemable currency, and have pointed out the return to a specie basis as the only path of safety.

As to the effect of the fluctuation of a paper currency upon the poorer classes, a little reflection will show it must be disastrous to them. The poor man receiving a dollar for his wages must spend it for his family or his own expenses, while the banker who has large sums can wait for a rise and take the chance of a loss. Another source of evil in a paper currency is that it is capable of production without limit, and that there is no ratio between the cost of production and value. It will cost no more to produce a note of $1,000 than of $1, and there is consequently no measure of value by which to regulate it. Having such a capability for production, the effect will be to drive from circulation the more valuable medium. This is a universal rule, and the proposition cannot be controverted. The speciousness of the argument relative to the repeal of the contract law has been shown in an argument advanced by the Chamber of Commerce, which goes to prove that, taking into consideration the rates of exchange, gold is the cheapest at the present rates. The case supposed was the purchase of a farm with greenbacks, borrowed at 70 cents on the dollar. The purchaser must not only pay the interest, but, in the event of the appreciation of the currency, the 30 cents difference in the rates of exchange. The result of the operation will be that the farm will cost more than if purchased for gold. The effect of the introduction of paper currency upon the mining interest will be peculiarly disastrous, for the value of the precious metals, unlike everything else, is dependent, not upon supply and demand, or upon the cost of production. The cost of everything needed in extracting it will rise in price, while the metal extracted will only increase the aggregate amount in the world.

The Senator has also stated that labor is timid, and needs encouragement, while capital is bold. The very reverse is the case. Capital could be hidden away. Its possessor can live upon it and watch for a favorable opportunity to invest, but the actual necessities of the laborer drive him to constant exertion. The leaders of all mobs are not capitalists, but starving men and women. The Senator's assumption, therefore, is the reverse of the actual fact, and for the purposes of his argument it is useless. For these and similar reasons I believe that the bill before the Senate should not pass. I do not wish to express an hostility to the currency of the nation, but when those at the head of our national finances are warning the nation of the dangers of an irredeemable currency when the necessity for its existence has passed away, and the wishes of the people of the State, as evidenced by their silence, are, as I believe, against it, I shall vote against the repeal of the present Specific Contract Law.

[NOTE.—The report of this speech is taken from the Sacramento *Union*, which says —"The many authorities cited, and which contained much of the vitality of the speech, are necessarily omitted."

Judge Belden seldom reduced his speeches to manuscript, and we are obliged to rely almost wholly on newspaper reports, which, unable to give the full language, often do injustice to the speaker.]

The question of removing the State Capital came up at this session as it had at every previous one. Senator Hardy offered a resolution "that the Committee on Public Buildings of the two Houses be instructed to examine into and report upon the advisability and economy of donating the capitol building, and whatever other buildings in the City of Sacramento the State has an interest in, to said city, and into the advisability of removing Capital to some other locality." Mr. Belden wished to have this question referred to the Committee on Public Buildings, and said:—

I believe the Senators are not at all tender-footed upon this question which has been before the people of the State for the last four years. There has been too large an amount of money already expended to be thrown away, however erroneous the cost of the project may have been. The enterprise has gone too far. Whatever may have been the improvidence and folly of our predecessors, the evil has gone too far for removal and Sacramento must have a capitol. The Committee on Public Buildings has had the matter under consideration and a bill has been introduced into the other house looking to the completion of this edifice—the only thing which can be done. The best economists of the State have been trying to solve the problem of completing the building with the least cost. For these reasons I wish to have the resolution referred to the Committee on Public Buildings.

Attention having been called by one of the Senators to the fact that Sacramento was subject to floods and liable to be inundated, Mr. Belden said:—

> I would not have addressed the Senate again on this question, had not the attention of the Senate been called to the late threatened overflow of the American River. It is true that on that night about one-thirtieth of the Legislature lent their efforts to prevent it, and doubtless saved the town from the threatened inundation. I agree entirely with the views expressed as to the financial condition of the State, and if there is anything new to be said on that point I will listen to it with pleasure. The gentleman from Solano has stated that the effect of the proposed levees is likely to create a flood, which will rise four or five feet higher than the present high grade. He believes that with the expenditure of a small sum, say ten thousand dollars, the capitol grounds, by reason of their limited extent, could be so protected as to defy anything except the original flood. As I remarked before, whatever may have been the folly of previous legislation, there has already been too much money expended to be thrown away. I hope the resolution will be referred to the Committee on Public Buildings, which has doubtless considered the chances of a flood as well as all other questions.

During this session of the Legislature, Mr. Belden introduced a bill to provide for the summary sale of mines or mining interests belonging to the estates of deceased persons. This was intended to prevent vexatious and expensive delays in the development of mines caused by the necessity of awaiting action by the courts.

At this time a great sensation was created by an editorial published in the *American Flag*, which charged that seven Senators (not giving their names), received the sum of $12,800 each for voting against the repeal of the Specific Contract Act, and that $24,000 was divided among the lobby for their services in effecting the arrangement. A committee was appointed to investigate. D. O. McCarthy, the editor of the *Flag*, was summoned to appear before the bar of the Senate and Mr. Belden was appointed to examine him He refused to disclose the names of the Senators whom he charged with bribery or to state from what source he had received his information. He was committed for contempt and remained a prisoner for nearly the remainder of the session still refusing to answer questions. Mr. Belden believed that no money had been used to control any member's vote on this bill; but that one of the Senators who belonged to the minority exasperated by his defeat, had "stuffed" McCarthy with the bribery story and that McCarthy wanting a sensation for his paper wrote the editorial without examining into the facts.

On the 19th of March, McCarthy being yet in confinement, Mr. Belden presented the following preamble and resolutions:—

> Whereas, the *American Flag* newspaper, published in San Francisco by one D. O. McCarthy, did, in its issue of February 7th, 1866, published of and concerning the Senate of the State of California, that seven members of the said Senate had been corruptly influenced to vote against the repeal of the Specific Contract Act, and that each of said seven Senators received $12,000 for so voting; and whereas, upon an examination of the said McCarthy touching said charges, before the open Senate, said McCarthy did answer that he was the publisher and proprietor of said newspaper, and that he dictated and approved the article in question, and did then refuse to answer certain questions propounded by the Senate as to the names of the Senators thus charged with corrupt practices, and did also refuse to give the names of any witnesses by whom said charges would be established, or of any evidence whatever tending to sustain the same, and did refuse to answer to any of the interrogatories then put to him by the Senate; and whereas, the said Daniel O. McCarthy for thus refusing to answer, was adjudged guilty of contempt of the Senate and ordered into the custody of the sheriff of the County of Sacramento until he should answer said questions and purge himself of said contempt; and whereas, it was afterwards reported to the Senate that the said D. O. McCarthy was willing and desirous to furnish the evidence concerning

said charges, and a committee was appointed to investigate the same, and the Senate, by resolution, ordered the committee to proceed and examine the said McCarthy touching the same, and he having then refused to furnish said committee any information concerning the witnesses, or any evidence whatever tending to establish said charge until he should be released from custody; Therefore, to the end that no obstacle, real or pretended, may remain to prevent a full and strict inquiry as to the charge in question, and that justice be done,

Resolved—That D. O. McCarthy be forthwith discharged from custody.

Resolved—That the committee heretofore appointed to investigate said charges do at once proceed with their duties; that they be empowered to send for such persons and papers, and to visit such places as they may deem requisite, and that they do particularly examine Daniel O. McCarthy under oath, as a witness in said matter; and said committee is further directed to report with all convenient despatch to the Senate.

In support of these resolutions Mr. Belden said:—

I believe the Senate has been wrong. Mr. McCarthy should have been summoned before the Senate as a criminal and not as a witness. The passage of the resolution will take away the last subterfuge left to the witness. I am unwilling that McCarthy shall longer play the martyr, and am determined to leave no method untried to have a full investigation, and either to have the truth of the charges established or to brand their author with everlasting infamy. I am not the author of the resolutions; they were drawn by several Senators who have, after mature deliberation, settled upon the course they indicate as the proper policy of the Senate. I have no fears of the result. I am as confident of the innocence of my colleagues as I am of my own integrity, and believe that an investigation will result in a perfect vindication of the character of the Senate.

The resolutions were adopted, McCarthy was released and the committee proceeded with its work. They were unable to make McCarthy testify, however, but secured enough testimony otherwise to enable them to report that no senator had been bribed, and that the charges in the *Flag* were "willfully and maliciously false."

What was called the "Exemption Act" came up for consideration in March, and to this Mr. Belden offered the following amendment:—

Every court house, jail, town hall, council chamber, public school house, public library, every public hospital and the real and personal property belonging to the same, and every square or lot kept open for health or public use or ornament, and such cemeteries and graveyards as shall not exceed the value of five thousand dollars, exclusive of those portions of such cemetery as are then in actual use for interring the dead; churches and buildings with their furniture, that are employed in any form of public worship; all asylums, hospitals and poor houses, employed for the relief of the helpless, the indigent and the afflicted; the buildings or rooms actually occupied by any organized fire company, together with the apparatus of such company; the property of widows and orphan children, to the extent of one thousand dollars, provided that when the whole property of such orphan or widow shall exceed in value one thousand dollars, no part of such property shall be exempt from taxation; growing crops and mining claims.

In support of this amendment Mr. Belden said:—

I believe that this is a subject which has exacted a great deal of attention, and I presume that Senators are ready to act upon it at once without a lengthy discussion. One of the objections urged against the exemption laws of the State is that they are unconstitutional. To this objection I will answer that the Supreme Court of our own State in a series of decisions, has decided that it is within the power of the legislature to exempt certain classes of property from taxation. In the case of the People vs. Coleman, in the 4th Cal. Reports, that tribunal has decided in express terms that exemption from a special tax was not in derogation of the Constitution as it then stood. That decision has remained unchanged. The Supreme Court afterwards directed that such an exemption did not prevent the taxation of the mines. The same tribunal also subsequently decided that the words "equal" and "uniform" applied only to direct taxation upon property, and that the legislature could make such exemption of property from taxation as might seem to them expedient. As a proof that the effect of these decisions was fully understood, I refer to the fact that no change in respect to these exemptions was made at the time of the amendment of the Constitution when they were called to vote on it. The people knew that there was a large amount of property exempt from taxation. They knew that mining claims were also at that time exempt from taxation, but they made no effort to procure a change. The fact, also, that provisions borrowed from other constitutions in relation to these exemptions had previously received judicial interpretations from the courts of other states is a strong argument in favor of their constitutionality. As for the question of policy, I do not believe that, to strike out all exemptions because they have been carried to an unwarrantable extent, is wise legislation. In my opinion such a course is not the proper remedy. It is true that, under existing laws, certain corporations have been enabled to acquire an immense amount of property. It is also true that widows have in some cases claimed exemption from taxation for a property worth even $100,000. I do not believe, however, that in consequence of these abuses in a few isolated instances, that the Senate wishes to declare that widows and orphans who are really poor shall be subjected to taxation; that all churches shall be taxed because a few corporations have amassed wealth. To provide for such as are really deserving is the object of this amendment. I believe that senators will recognize this as a wise and just course of policy. As to another description of property which has received the benefit of exemption—mining claims—there is serious difficulty in the way of ascertaining its actual value. The question is not a novel one; it has been discussed from year to year in the Legislature and in the Congress of the United States. The bill recommended by the Committee on Finance proposed that all mining property shall be taxed at once without any knowledge as to its actual value. The bill also proposes a taxation of growing crops, which have been exempted since the organization of the State, on account of their necessarily uncertain value. I am of the opinion that church property which is actually used in the worship of God should be exempted; but that any property from which a religious association derives a revenue should be taxed; that the property of public hospitals and charitable institutions, not a source of revenue, should be exempted; that the property of widows and orphans under one thousand dollars should be exempted, and that the necessary apparatus of fire departments should be exempted.

In the further discussion of the bill Mr. Belden said:

I believe the primary object in the removal of the exemptions is to provide for the taxation of mining claims. The decisions of the Supreme Court warrant the assumption that there is nothing but the power of the Legislature to exempt, standing in the way. The Allison Mine is an exceptional case. It may have produced five hundred thousand dollars a week for a short time. Its ordinary expenses are three thousand dollars per day, and for months at a time it has not returned a dollar. The Rocky Bar Mine, at Grass Valley, has made its present owners rich. Since I have been acquainted with it, a gentleman from New York spent eighty thousand dollars in endeavoring to develop it. He had a wife and four children whom, as a fit catastrophe to his ruin, he killed with his own hand and sought for himself a refuge in death. The present owners in the first day's work struck the ledge for which he had so long sought. This is not a peculiar case. Similiar instances are common in all mining regions. Whenever such mines are found mills are erected, villages spring up and taxable property is created, and then the cry arises that the whole mining region should be taxed. The fact is that there is no certain guide to the value of the mines, and that they cannot bear the burden of taxation.

While Senator, Mr. Belden opposed all railroad subsidies—a bill was presented providing for the payment by the State of interest upon the bonds of the Placerville and Sacramento Valley Railroad Company, to the amount of $750,000. Mr. Belden vigorously opposed this measure.

A bill having been introduced to permit all persons to testify in courts of justice, except those of unsound mind and children under ten years of age, Mr. Belden moved to re-commit the bill to the Judiciary Committee with instructions to so amend as to exclude Chinese, Mongolians and Indians, in cases where white persons were parties. He maintained that it was impossible to ascertain whether they were testifying truly or falsely. He said that his experience had taught that from their ignorance of our language it was impossible to submit them to a cross-examination and thus illicit the truth.

One of the grandest speeches ever made in the California Senate was an impromptu address delivered by Mr. Belden on the last night of the session. Unfortunately, no report is in existence. The official reporter says that the speech was so unexpected and the eloquence so thrilling that he forgot his duties and listened entranced to the end. Afterwards, in attempting to prepare a synopsis, he discovered that any effort in this direction would be impossible and it was abandoned. But, although lost to the record, this address still lives in the memory of those who heard it and is still referred to as "Judge Belden's great McDowell speech." The circumstances under which it was delivered were peculiar. Early in the session, a concurrent resolution had been introduced in the Assembly requesting the President of the United States to appoint Brig. Gen. McDowell to a Major Generalship, then vacant. The resolution passed the Assembly and came to the Senate where it was referred to the Committee on Federal Relations. This Committee reported it back with the recommendation that it be adopted. It was placed in a pigeon hole and forgotten until the last hours of the Senate. Then its author remembered it and asked one of the Senators to call it up. This was done and it was supposed that it would be adopted unanimously and without debate. But several of the Senators who had been in sympathy with the rebellion, immediately attacked it and made of the occasion an opportunity to deliver themselves of rebukes to the Union soldiers and eulogies to the Confederacy. This attack was unexpected. The galleries and lobby were crowded with people who had come to witness the closing ceremonies of the Legislature. At these the speeches of the Southern sympathizers were directed, the object being to create an impression that the Senate sympathized with the rebellion. Mr. Belden replied, his speech occupying about a quarter of an hour; but, as one of his auditors said, "there never was before and never will be again, fifteen minutes crowded so full of patriotic eloquence as was the quarter of an hour during which David Belden expressed his opinion of the rebellion and its sympathizers on the floor of the California Senate in 1866."

During the next session of the Legislature in December, 1867, the Senate was composed of the following members:—E. L. Bradley, Placer County; David Belden, Nevada County; Phineas Banning, Los Angeles; Horace Beach, Yuba and Sutler; William Conn, San Diego and San Bernardino; N. Greene Curtis, Sacramento; John Conly, Butte, Plumas and Lassen; J. N. Chappell, Shasta and Trinity; S. Ewer, Butte, Plumas and Lassen; J. W. Freeman, Fresno, Kern and Tulare; James J. Green, Contra Costa and Marin; John S. Hager, San Francisco; George W. Hunter, El Dorado; Thomas Hardy, Calaveras; E. H. Heacock, Sacramento; James Johnson, El Dorado; H. Kincaid, San Francisco and San Mateo; W. J. Knox, Santa Clara; J. H. Lawrence, Mariposa, Merced and Stanislaus; E. J. Lewis, Colusa and Tehama; F. A. McDougall, Monterey and Santa Cruz; J. W. Mandeville, Tuolumne, Mono and Inyo; D. L. Morrill, Calaveras; L. H. Murch, Del Norte, Humboldt and Klamath; P. W. Murphy, San Luis

Obispo and Santa Barbara; L. B. Mizener, Solano and Yolo; J. E. Perley, San Joaquin; Wm. W. Pendergast, Lake, Napa and Mendocino; George Pearce, Sonoma; L. E. Pratt, Sierra; E. W. Roberts, Nevada; A. H. Rose, Amador and Alpine; Henry Robinson, Alameda; John H. Saunders, San Francisco; W. J. Shaw, San Francisco; Charles A. Tweed, Placer; A. L. Tubbs, San Francisco; E. Teegarden, Yuba and Sutler; Oliver Wolcott, Tuolumne, Mono and Inyo; E. Wadsworth, Siskiyou.

On the sixth day of December, the organization of the Senate having been completed, Mr. Belden rose in his seat and said:—

I believe the urgent business of this body has now been disposed of. I, therefore, rise for the purpose of making a formal announcement here of the death of the Honorable William J. Knox, late a member of this body, from the Seventh Senatorial District (Santa Clara), and I propose, sir, to offer some resolutions of respect to his memory. Before presenting these resolutions I wish to make a few brief remarks and give a review, perhaps, of his character and position in this State, which may serve as a kind of foundation to the resolutions which will be subsequently presented. The Honorable Senator was a native of Kentucky; he came to California in 1850 and settled in the City and County of Nevada, engaging successfully in the practice of his profession as a physician. He remained there, and, successful not only in that, took also a prominent part in the other enterprises of the day and of the vicinity, early assuming a very high position and very excellent reputation with the people and citizens of that county. His name is identified there to-day with many of the most important industrial enterprises of the section, and some engineering works which his capital assisted to complete, with which his enterprise was directly connected, stand there amongst the foremost of their kind in this enterprising State.

In 1855 he was a member of the Assembly from the County of Nevada, and filled that position with honor to himself and advantage to his constituents, and to the advantage of the State at large.

In 1864 he removed from the County of Nevada to the County of Santa Clara, and immediately assumed there the same high position which the universal verdict of the people of Nevada County had assigned him in the mountains. I may say in this connection that he allied himself in the same extensive manner with the public enterprises of his new home, taking rank as one of its most energetic and useful citizens.

In 1865 he was elected to this body as Senator from that district, and I may say here that, taking his seat in this body with impaired health, the disease that ultimately proved fatal preying upon his vitals, his position here was in the highest degree honorable to himself and to his immediate constituents.

Unpracticed in public discussion, he rarely occupied the attention of this House by a formal speech, but what he did say, and his votes, were always upon the right side. He rarely or never erred in his judgment, either of men or measures, and to-day the record of his votes, as they appear upon the journals of this House, contain not one line that his friends could wish otherwise, and that would not, as a monument, serve as his best eulogium.

This, sir, in brief, was the character of our late associate. It may, indeed, be well said that his actions in connection with two important sections of this State will rest as the best eulogium that can be pronounced to his memory. I will say, Mr. President, in offering these resolutions of respect, that it is well that we, as Senators, can meet here upon one common ground, where political asperities are at an end; where, for a time, we can forget that we are partizans in any sense of the word, but hold ourselves and each other bound by that higher bond of association which here unites us with the departed, to whose memory we combine in paying this simple tribute.

I offer, therefore, as expressing the sense of the Senate and our bereavement, the resolutions which are in the hands of the Secretary.

At this session Mr. Belden was appointed Chairman of the Judiciary Committee of the Senate.

A motion having been made to print the public documents and the laws in Spanish, the usual debate ensued, during which Mr. Belden said:—

I, too, am in favor of printing things in Spanish, as it has been stated that the State Treasurer is not familiar with the English language; and it is not improbable that he will have occasion to refer to some of the public documents. I am also in favor of translating and printing in the Chinese language for the reason that probably the lax ideas of the Chinese inhabitants of California concerning *meum* and *tuum* are entirely owing to the want of a translation of our laws into the Chinese language. (Laughter.)

As indicating the sentiment of the Senate regarding the coming Presidential election, Mr. Belden presented the following resolution:—

Whereas, the voice of the loyal citizens of California unmistakably demands that the illustrious general who so successfully led our armies in war should direct our government and guide our councils in peace, therefore

Resolved—That we, the Union Senators and Representatives of the California Legislature, in convention assembled, do declare our choice to be, and earnestly urge upon our Union brethren and upon the National Convention to assemble at Chicago, May 20, 1868, the selection of Ulysses S. Grant, as our candidate for the office of President of the United States.

This Legislature was to elect a United States Senator to succeed John Conness, and, in the Union Senatorial caucus convened December 13, 1867, to name a candidate for this position, the names of Ex-Governor Low, John Conness, A. A. Sargent and Thomas A. Brown were proposed.

Mr. Belden presented the name of Sargent, and urgently advocated his cause. Several ballots having been had with no result, a proposition was made to harmonize by withdrawing the names of certain candidates. To this proposition Mr. Belden replied:—

I would not hesitate to withdraw the name of Mr. Sargent if I could anticipate any evil to result to the party from retaining his name; nor would Mr. Sargent himself be willing to stand in the way of the welfare of the Union party or the advancement of its principles. But, while Conness is at present an honored Senator, and Low has just retired with high honor from the position of Governor, Sargent has received no recognition of his great services in the Union cause since his election to Congress before the Rebellion, and I do not think it is good policy to shelve our best men merely because they have opponents, and I hope that Mr. Sargent will receive this endorsement.

The opponents of Sargent, however, united on Brown, and gave him the nomination. It was an empty honor, the Democrats having a majority in joint convention which they employed to send Eugene Casserly to the United States Senate.

A bill was introduced repealing that section of the marriage law which provides that where parties have cohabited, or lived together as husband and wife, no license should be required to be married. Mr. Belden opposed the repeal, and, during the debate, said:—

I am in favor of referring the bill to the Committee on Public Morals, and hope their action will secure its defeat. I believe the bill pernicious in principle and that it will accomplish the very opposite of the result wished by the framer; that its tendency will be to induce or compel those who are unlawfully cohabiting together to continue their immoral relations. Legislatures should deal with the world as it is, with human actions as they are sure to be and not as they may wish them to be. It is certain that for all coming, as well as for all past time, there will be these unfortunate relations. Persons will be brought into this connection from numberless causes, that will constantly occur; and, as years improve their judgment, gives them social position, removes them from the witness or knowledge of their youthful folly and indiscretion, and gives them children whose social position might be seriously compromised by their parents' position, they will be not only willing but most anxious to retract the error of their youth.

It frequently occurs that parties whom the community supposed married, were only lawfully united in wedlock when death threatened the one or the other, and then the rite is always administered with such privacy as secures the ceremonies from the scandal that must follow its publicity. If the exception were repealed, the parties will be compelled to publish the shame of the life-long companion and blush for her memory while they mourn her loss. I cannot imagine a more painful bereavement than that of daughters and sons learning that the life that had been one of devotion and affection to themselves, had been one of shame and degradation to the parent just lost, and, rather than one such case should arise, I will risk the premium on debauchery so graphically depicted by the Senator from Sonora.

I do not believe that the exception in the Statute has anything to do with seduction or icentiousness. It is my opinion that when parties start upon this course of life, they do not enter upon any very extended examinations of the Statutes or attempt to adapt their proceedings to legislative enactments. Were it otherwise, were it the fact that young persons enter upon a life of debauchery with the full consideration of the law, and willing to degrade themselves to evade its provisions, I should say that such conduct indicates a cold-blooded and calculating depravity that is not worth, and probably would not ask the protection of the law. It is well known that very many of the discoveries of these illicit connections are made through the Confessional of the Catholic Church, and that this Church imperatively compels marriage as soon as the fact is ascertained. Is not this well? Is it not better that every inducement and persuasion should be offered to those living either openly or secretely in this connection to conform to the laws of religion, of society and of decency, without compelling the publication of their shame, and accepting it with loss of character, of friends and of social position? I think the exception wise and humane, and, while I would place every bar in the roads that lead to vice and licentiousness, neither my voice nor my vote shall place a straw in the paths by which the wanderer may seek to return to virtue.

A preamble and resolution was presented stating that whereas charges had been made in the newspapers that corrupt means had been used in the election of United States Senator, therefore a committee be apointed to ascertain what truth there might be in the charges. There was a lengthy debate, in the course of which Mr. Belden said:—

It strikes me the province of the Committee on Public Morals, however well it may be adapted to general legislation, will be very greatly enlarged by the consideration of this resolution. If there be any foundation for these rumors, it should be investigated to the bottom. I am in favor of this investigation, not because I am opposed in politics to the party against whom these charges are made, but I am in favor of it as a Senator having an interest in, and a regard for, the honor and character of my associates. If there be one man in this body who has been influenced by any other consideration than those which are honest and honorable, I wish to know it. If there is any one here who has been approached through the lip with money or with greed in his eye, I desire to know it, and to have this unworthy member ignominiously expelled from our midst. The Senator from San Francisco lays great unction upon it that this Committee will go "nosing" around after every variety of charges. I can say to the gentleman that the more serious the charges, the worse the stench, the greater is the necessity of inquiry.

When our cities are in danger from pestilence, it is in the sewers and cess-pools that the sanitary committees work, to avoid the impending calamities. And I say if you sit here and allow such charges of corruption to fester and rot beneath us until the very pillars of our State sink down into this vile slum, there will be nothing left but anarchy and degradation.

Two years ago I was in favor of the investigation to which reference has been made. The inquiry is made here triumphantly, what was the result of that investigation? I can answer the question: the committee probed the matter to the very bottom: they brought the slanderer before them; they examined him under oath; they took every one of the charges and investigated them and they vindicated the Senate as fully as it was possible to have the body vindicated. The report of the committee was that the charges were false. Permit me to say that when this investigation shall have been disposed of, the Democratic Party will, in my opinion, be likewise vindicated, and, if they will come out of it proudly and untarnished, let me assure each and all that I will rejoice. It is as a Senator that I ask this investigation; it is as a Senator that I demand it.

A bill was under consideration amending the Homestead Act in relation to undivided and unacquired interests in real estate. Mr. Belden, in support of the bill, said:

> The object of the bill is to enlarge the number of those who may acquire homesteads in this State, by removing the unjust and inequitable exception in case of unacquired interest, which the decisions of the Supreme Court have thrown into the Homestead Act. In the United States generally, and in this State particularly, homestead rights have been very sedulously guarded, constitutionally as well as otherwise. Under our constitutional provisions on the subject, the legislature has passed enactments, one after another, until every class of citizens, married or unmarried, are now in a position to acquire homesteads which cannot be taken from them under execution. About the wisdom or policy of such legislation there can be no question. It gives a home, at least, to every one,—to the unfortunate in business as well as the successful—of which they cannot be deprived. The principle commends itself to our highest ideas of justice. But the Supreme Court has made an exception to the privilege of acquiring homestead rights where an undivided interest is held by one tenant in common, independently of the party claiming or endeavoring to acquire a homestead right. I refer to the instance mentioned by the Senator from Alameda the other day, where one-twenty eighth interest deprived all others on that tract from acquiring homestead rights.
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> The same state of things exists in other agricultural counties, particularly where there are Spanish grants. This difficulty has become a crying evil. The fact that a quarter or a fraction of the land was held by outside interest is sufficient to deprive all the parties of the privileges of the Homestead law. I hold that if it becomes necessary to have the property divided, the general partition laws of the State will prove amply sufficient to accomplish justice to all parties.

In the debate on the bill to repeal the Act to authorize husband and wife to become witnesses in criminal cases, Mr. Pendergast, who supported the bill, cited a case where a woman was compelled by her friends to testify to her own shame to save her husband's life, the theory of the defence being that the homicide committed by the husband was committed under the influence of passion caused by criminal intercourse between the slain man and the slayer's wife. The action was brought by the brothers and sister of the husband and a pressure was brought to bear which she could not resist. He believed that she testified to a deliberate lie to save her husband's life and he did not blame her for it.

To this Mr. Belden replied:—

> I do not believe that the evils of the extreme case referred to by the Senator from Napa are of frequent occurrence. In all my experience as a lawyer, I have never yet seen a wife called to testify against her husband. But, in answer to the particular case cited, I will suggest to the Senator the converse. Suppose the husband had slain the adulterer, whose lips were sealed by death, while the wife's were sealed by the law. The only person who could, would stand disqualified to testify against the despoiler of his own hearthstone, and the husband would have to expiate with his life what all are ready to concede had not been a crime.
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> On the day when we are opening our courts and allowing even felons to testify under certain circumstances; when we are breaking down all the barriers, allowing the Chinese to give their evidence, it is unwise to take one step backwards until, at least, the experiment has been well tried and the evil results of such a law, if they exist, are demonstrated.

On February 8, 1868, the President of the Senate announced that he had received a communication from the Mayor and Common Council of San Jose and from the Board of Supervisors of Santa Clara County, soliciting the members of the Legislature to visit San Jose and examine for themselves its eligibility as a location for the State Capital, and tendering the hospitalities of the County to such as might accept the invitation; also, should the Legislature determine to remove the Capital to San Jose, tendering to the State the free and entire use of the Court House until the Capitol building shall be completed; also a resolution of the Mayor and Common Council of San Jose, tendering to the State forever one of the public squares of that city for a Capitol and other public buildings and public uses, the Legislature to select the square.

A motion having been made to accept the invitation and visit San Jose, Mr. Belden said:—

I do not know exactly what the object of this is, but I suppose it has some reference to examining that locality as to its eligibility for the Capital of the State, and believing that to be the object, I hope the invitation will not be accepted. I hope it will not be done for this reason: that I do not believe any Senator or member of this Legislature will have his views upon the prior legislation on this subject in this State changed in the least by the facts that may be elicited by such a visit. I have not the least doubt that the valley of Santa Clara and the vicinity of San Jose are beautiful places, not only for the Legislature to visit at this time, but for future Legislatures to assemble in for the transaction of affairs of the State. I have not any question upon that point, but, if we should go down there and, as a result, make up our minds that our predecessors made up their minds unwisely as to the location of the Capital, I do not think that even then anybody would come back with his opinion changed as to the propriety of removing the Capital. We would only be fooling away two or three days without any possible result, and the people would feel themselves under very small obligations to us for making the journey at their expense.

Now, sir, permit me, while I am on my feet, to make another remark. There has been a good deal of discussion in the Senate with reference to the State Capitol and its construction; very many suggestions have been made as to the substantial character of the work, the chances of overflow, the nature of the foundations, etc. I would suggest that by adjourning this noon or to-morrow noon and taking half a day for it, this entire Senate can go up and examine the premises for themselves, and can see the extent to which the alleged settlement of the foundations has impaired the walls, in short, can form an idea for themselves. And, sir, if it will be in order, I suggest that, in place of accepting the invitation of the City of San Jose, the Senate consider themselves invited to attend in a body on a visit to the State Capitol this afternoon or to-morrow, and to inspect, in order to determine for themselves the propriety of continuing the work on that building. I hope, at all events, that this invitation will not be accepted, and two or three days thereby consumed for nothing.

In the discussion of the bill to make eight hours a legal day's labor, an amendment was offered to the section, providing a punishment for overworking minors, by excepting such as were over seventeen years of age. On this subject Mr. Belden expressed his opinion as follows:—

This bill was reported back from the Judiciary Committee without amendment but afterwards it was represented to them that it would have the effect to prevent the possibility of mechanics taking apprentices, because apprentices could not, or would not, during the first year, pay for their own support. Whether such will be the actual result of this bill I cannot say. The Committee are very decidedly of the opinion that, if the eight-hour law is to pass, there should be a provision in it protecting minors who are too young to protect themselves. The age of seventeen is suggested as one above which young persons will have no longer need of such protection. If the passage of this Act is calculated to prevent young persons from acquiring trades, I would be opposed to the entire proposition; and, from representations which have been made to me, I am inclined to believe that such a result may possibly follow. With the present amendment, however, it is understood and proposed that the the bill shall pass.

A concurrent resolution was presented, requesting the Senators and Representatives in Congress to use all honorable means to the end that the territory of British Columbia should be acquired by the United States. Mr. Belden opposed the resolution, saying:—

I entirely agree with the Senator from San Francisco (Mr. Hager), that we would do better to postpone this matter until the 4th of March; and further than that which has been stated in favor of such postponement, it may be suggested that by a consideration of all kindred resolutions at the same time, if any question may be made as to the correctness of the entire principle, as suggested by Senator Shaw, we can then proceed advisedly. But, I submit, if this principle is to be carried out to its ultimate results, as it seems some are disposed to think should be done, it will not end until our Government includes the whole of South America—I believe that is connected with us by a ligament (laughter). In addition to that there is a financial view of the case; it is not unreasonable to suppose that we may have to pay for these territories, and I have heard it suggested that the United States is largely in debt, all on account of some little difficulties it has had on hand, so that there has been some question even as to its solvency; and I have heard some questions asked as to the real value of purchases already made. In fact, Providence seems to have expressed its disfavor at such purchases by instantly visiting the regions concerned with storms and shaking them up with earthquakes. As to reference, if any reference be necessary, I think the Committee on Public Morals would be the proper committee, as it would be their province to inquire into the morality and business sense of purchasing even so desirable an article before ascertaining the circumstances of the sufficiency of the funds to settle for it. It strikes me that the resolution should be in the hands of two or three committees at the same time, that there should be some general system or plan arrived at before we go on acquiring further territory.

I am entirely in favor of settling this matter on a correct basis; and, if we are to have the balance of the universe, I would suggest that we had better accomplish it by a comprehensive bill defining the limits of our country, not by parallels of latitude, and meridians of longitude, but astronomically. (Laughter.)

I hope that the resolution will be postponed until the fourth of March, by which time a proper bill embracing these provisions may be put into shape by the appropriate committees, and the results desired by the Senators from San Francisco (Mr. Shaw) and from Solano (Mr. Mizner) accomplished in one measure, thereby avoiding the inconveniences of having it done by piecemeal. (Laughter.)

A change in the method of impeaching witnesses was proposed, providing that witnesses may be impeached, not only on the question of truth and veracity, but also on general reputation for honesty and integrity. Mr. Belden's views on this matter were thus expressed:—

In my opinion, the change proposed is founded not only on the soundest principles of philosophy, but of morality. The Judiciary Committee admits that this is a departure from the rule which has obtained heretofore. The ordinary question in court is: "Do you know the reputation of the witness in the community in which he resides for truth and veracity?" and, though he may be a recognized thief, they cannot present the fact to the jury. Therefore he is left to stand on an equal footing with any other undoubted witness. The general law prohibits children under a certain age, and idiots and persons convicted of crime from testifying altogether, but every attempt to impeach a bad man's word results, invariably, in failure. This is not the way the laws stand in England, nor in many of the Eastern States. In the 27th California Supreme Court Reports the amendment is recommended as the proper step for the Legislature to take, the case suggesting the matter being the testimony of a prostitute. Why should not a jury be furnished with the same means of determining the credibility of a witness as we all possess in our everyday intercourse? The amendment to the law is entirely in accordance with the practice of the most enlightened courts of the day.

In reference to an attempt made to reduce the salaries of District Judges, Mr. Belden said:—

I do not think the bill a proper one. I object to it because, in the first place, the apportionment is not correct. In the mining counties it costs more to get around, and other matters are more expensive; therefore the salaries should be larger. Furthermore, in the same ratio that the salaries are reduced, the grade of the applicants for the office will fall. The result of the bill will be the election of an inferior grade of judicial officers. My observation has not shown me, as yet, that the district judges in this State are accumulating fortunes. During three-fourths of the year they are away from their families, boarding at hotels and living in an expensive manner, so that at the end of the term they generally find themselves as poor as at the beginning. The immediate

> effect of the bill will be to shut out the Bench as an attraction for the real leaders at the Bar, and open it for persons who, though not entirely disqualified, are yet not possessed of those special qualifications which should characterize the incumbent of that office.

The bill to encourage the planting of shade or fruit trees on public highways came up at this session. It provided that under directions from County Boards of Supervisors, property owners might plant trees on the public highways, and at the end of four years receive from the county one dollar for each such tree then living and in a healthy condition. Mr. Belden's approval of this bill was expressed as follows:—

> I am in favor of the bill on considerations of public policy. I am informed, and no doubt it is correct, that all through Europe they have commissioners of forests, doing for the state in this respect what each man here does for himself. It is found necessary for the purpose of supplying the people with fuel and also with rain, for it has been discovered that the planting of trees exerts an influence on the climate.
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> It is a matter of commercial importance, too, that the forests should be replanted where the hand of man has denuded them. I am in favor of the bill because it is a proposition to beautify our common country. All over the valleys of this State our bright skies and beautiful trees are made the theme of universal eulogy. How very much our State would be improved and this picture heightened, could a law like this be placed in practical operation for a few years!
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> Another reason in favor of the bill is founded on purely financial principles. A large quantity of valuable timber may be grown, to serve for beauty and ornament while living, and as a source of revenue when removed. So far as the small compensation is concerned; of one dollar for a tree that may live and grow for centuries, it is no consideration.

An Act to amend the Act for the formation of corporations for the construction of plank and turnpike roads was explained by Mr. Belden as intended to take the place of a local bill relating to San Joaquin County alone; the object of which was to authorize the Supervisors to let certain public roads to parties who should macadamize or gravel them, and have the right to collect tolls thereon for a certain term, after which the improvements would revert to the State. Though drawn with a view to the condition of things in San Joaquin County, where the roads were impassable without such improvement, the bill had been made general because the circumstances were the same in many other counties. It was believed that the general interest would be subserved by lodging such a discretion with the Supervisors. During the debate that ensued, Mr. Belden said:—

> My experience has disgusted me with the public roads of California. All the public roads are turnpikes, though they are, at certain seasons, utterly impassable. They are, too often, made a mere pretence for swindling the public. In my judgment, the principles of the present bill are of universal application. The bill proposes that the Supervisors shall give public notice, of not less than four weeks' duration, of their intention to allow any private road to be established as a public road over the county, giving every citizen an opportunity to object or remonstrate; then it provides that in twenty years it shall revert to the county. The Supervisors are authorized to impose just such terms on the grantees as they deem proper. So long, therefore, as the people shall elect fit Supervisors, no injury or injustice can result from the operation of the bill as a general law. I have entire confidence in the Supervisors of Nevada County at any rate.

On February 29, 1868, resolutions approving the course of Congress in its controversy with President Johnson came up on special order. A call of the Senate was had, when it was found that no quorum was present, the Democratic members absenting themselves to prevent action on the resolution. Extensive "pairing" was done to produce this result. Mr. Belden expressed his opinion of this state of affairs as follows:—

> I contend that a reprehensible fraud is committed when members of the same political party pair by agreement among themselves in order to prevent a quorum. The privilege of pairing is merely a courtesy, and it is the duty of every member availing himself of that courtesy, to be sure that he is paired with a political opponent. I warn the minority that they are themselves inaugurating a practice that may react upon themselves before the close of the session. I understand perfectly that the resolution offered by Mr. Heacock will affect nothing; that they are neutralized by the action of the Assembly, so that California will be counted out, so far as relates to the great issue now before the Federal Congress; yet it is but right that the minority should defer to the majority.

A committee was asked for to investigate charges against the Central Pacific Railroad Company; that the Company had diverted the money granted by the State to be used for building its road, to the purchase of other railroads. Mr. Belden said:

> I will vote in favor of the indefinite postponement of this resolution because the investigation will involve a large expense while, at this late day in the session, it will be impossible to accomplish any useful result. If I am correctly informed, four years ago a similar committee was appointed and furnished a Sergeant-at-Arms and all the paraphernalia, but they did not even get a peep into the inside of any of the Company's books, and were scarcely allowed to come into the office. Owing to the difficulties inseparably connected with such an inquiry, I doubt whether the committee will accomplish any practical result. It is said the Company has purchased side tracks with the money. There is not a lawyer on the floor who will maintain that the State can recall its bonds, though the Company should be convicted of malfeasance. It is a proper subject for legislative inquiry; but only a little more than three weeks of the session remain; a great deal of other work remains to be done, and I consider it would be unwise to enter upon a business where nothing but discomfiture can result."

A resolution was offered that the practice of "pairing" is founded on doubtful Parliamentary authority, and is in violation of an express rule of the Senate, as well as of the duties of members to their constituents, and that it should be discontinued. A lengthy discussion followed, during which Mr. Belden said:

> As Chairman of the Committee on Rules, I apologize for not having provided any better against the contingencies brought about by the eloquence of the Senator from El Dorado (Mr. Johnson), but the Committee was of the opinion that the Constitutional obligations of Senators, their obligations to their constituents and their duty as gentlemen, would be sufficient to make them vote, unless some good excuse could be presented by them. I am satisfied that, to provide against all contingencies, there should be some rule, with penalties to be enforced when members prove so far forgetful of their duties and obligations to their constituents as to refuse to vote when their names are called,—penalties the same as were prescribed for committing perjury, or stealing a dog, or committing any other offence against the general laws of the land. No such necessity has been recognized heretofore, because no contingency of the kind had arisen; but, in view of the prophesy made on the floor yesterday, as to the future political status of this body, it may be advisable to have the laws amended. Leaving the matter of a penalty, however, to be provided for by those who may find the necessity for it to be so overwhelming and controlling that they cannot themselves escape the necessity for it, I will say that I am in favor of this doctrine of pairing, and do not quite agree with the Senator from El Dorado (Mr. Johnson) that John Quincy Adams might not have been guilty of declamation. I saw in Benton's "Thirty Years in the Senate" that they occasionally indulged in something of the kind. It is barely possible that the Senator from El Dorado does not exactly understand what is meant by the word "declaiming." It may be understood in a disparaging sense, but I do not take it so. I understand it as simply the employment of those pleasing graces by which they rendered their oratorical efforts as effective and eloquent as was the speech of the Senator from El Dorado. It was that which made them so acceptable to the persons to whom they were addressed, and that is what I understand by "declamation."

It did not in the slightest degree detract from the reputation of Colonel Benton or John Quincy Adams if they did seek to make their remarks or their logic more convincing by the aid of these little blandishments. With reference to pairing, to refuse or prohibit it by law, will reduce the average of our representatives. It has been claimed that gentlemen are the best representatives who themselves have large interest at stake, financial or otherwise, because the evils of pernicious legislation will fall with peculiar weight upon them. But, having other business or other professions, the legislator would have to attend to them; yet his political position might render it in the highest degree improper that he should leave his place for a moment without the privilege of pairing, through which he was enabled still to give his constituents the benefit of his vote. It has been practised for years in spite of the arguments of Adams and Benton and it has become established as a law, in Congress as well as in the British Parliament, and in the Legislature of this State. I have never heard it seriously called in question until the Senator from Mariposa (Mr. Lawrence) offered his resolution in regard to it to-day. It is the law of courtesy, it is the rule of gentlemanliness, a regulation of common sense by which each member is enabled to discharge his duties, not only to himself, his family and his clients, if he have any, but to the constituents whom he represents. It enables him to do justice to the State, in the Legislature where he is serving as a member, without necessarily suffering injury to his personal interests.

MR. JOHNSON.—I am very much instructed at hearing from the Senator that I have been very eloquent. I thought, during the course of my remarks the other day, that if I had ever seen anybody seem to experience agony or pain, the Senator (Mr. Belden), judging from his countenance, must have done so while I was arraigning the Radical Congress.

MR. BELDEN.—I admit it. (Laughter).

Upon the bill creating the office of Insurance Commissioner, Mr. Belden thus expressed his opinion:

I believe the bill to be correct in principle and that it should be passed exactly as it stands. If I understand the theory of insurance, the object is to guard against loss from casualties, and the single object that the Legislature should have in view, is to see that the people who give their money shall have a corresponding security in the contingency of such casualty happening.

What does the bill propose to do? It proposes simply to establish a law of solvency, and, in order to carry it out in practice, it is necessary that some one should be appointed to exercise scrutiny. How could they ascertain, otherwise, whether a man is solvent or not, when the entire evidence is to be found in his own books? It is not an extraordinary authority, but it is essential. Steamboats, weights, etc., are inspected; it is wisdom rather to anticipate difficulties that may arise, than to wait until it is too late. The effect of the bill will be to shut out a ruinous competition from the irresponsible men who are without capital, as operating against those who are doing business on a proper basis. As to the manner of appointment, I hold that it cannot possibly be more carefully guarded. The Commissioner is appointed by those acquainted with the business, but the Governor is not obliged to appoint their choice, and he has the power at any time to remove. If this bill is defeated, I am of the opinion that, at some future day, not far distant, when the people will, perhaps, be pretty generally insured in every kind of bogus companies, they will find, upon the occurrence of some great conflagration, that they have leaned upon a broken reed.

The great contention in the Senate was the bill to grant the Central Pacific Railroad Company the privilege of purchasing fifty acres of tide lands for depot and terminal purposes. Mr. Belden said:—

In the drawing of this bill the purposes of commerce and the interests of the people have alone been consulted. I believe that 150 acres will be needed by the Company. It is to be a terminus for two great trans-Atlantic railroads, and a depot for the Asiatic trade, embracing storehouses as well as the other usually required railroad buildings. I am of the opinion that the State will be far better off with the tide lands off its hands. It is not the true policy of any state to speculate on the enhancement of the value of its lands. The right way is to put them into the hands of individuals, and to seek the advantage of the State in the improvements which she would encourage on them. The sooner the State is rid of all its public lands, the better, and I shall vote for every measure coming up in the Senate having that object in view. I am not here as the advocate or defendant of the railroad companies, but, in order that the great donation made by

Congress in aid of the Pacific Railroad may be made effective, I am in favor of granting them a reasonable amount of land, which, I argue, ten acres is not.

Mr. Johnson of El Dorado having contended that ten acres was enough, Mr. Belden cited cases of iron and other manufacturing establishments having fifteen and even twenty acres under roof. Continuing, he said:—

Two years ago I voted against a proposition to give away several millions to a corporation, and the gentleman from Sonora (Mr. Pearce) was with me; but where was the gentleman from El Dorado then?

MR. JOHNSON.—The celebrated Dutch Flat route got a big appropriation, and I was only voting to get a railroad into my own place.

MR. BELDEN.—The Senator voted for a subsidy compared with which this is nothing at all; and his subsidy was to go to a monopoly. The result of the Senator's vote was powerful enough to defeat the party that had made itself responsible.

MR. JOHNSON.—I have reformed, but the Senator from Nevada is degenerating.

MR. BELDEN.—The gentleman says he has reformed, and it is high time. The difference between myself and the gentleman from El Dorado is that I vote for the bill which is intended to improve the lands of the State, while he voted to give cash out of the treasury to subsidize a bloated monopoly. I believe that the advantages of disposing of this land will immeasurably outweigh all considerations of injury or loss to the State. Furthermore, I would just remind Senators that at the last session, the Senator from El Dorado voted to donate the tide lands at San Francisco, in a body, to one company, which was to improve them. He voted to give these tide lands to a set of men who got surveyors and slipped out surreptitiously in the night and staked off a tract which they had the impudence to come here and ask to have confirmed. If I do what I believe to be right in casting my vote upon this matter, I care nothing whether the world approves or disapproves of my course. The future will fully justify the action of the Legislature which shall make this bill a law.

A bill was introduced to remit taxes on mortgages. Mr. Belden opposed it, saying that it was taking from $400,000 to $700,000 of taxes, directly in the face of the decisions of the Supreme Court, that exemptions from taxation were in violation of the Constitution, and returning it to the bankers and wealthy citizens of San Francisco.

On March 18, 1868, he introduced a bill to fix and establish the rates of freights and fares on railroads. The bill allowed seven cents per mile for passengers and ten cents per ton for freight under 1,500 feet, nine to twelve cents respectively between that and 4,000 feet. In introducing this bill he said that it was evident that neither in the Assembly nor in the Senate could any bill on this subject heretofore introduced, be passed and become a law. So he was informed by the friends of that proposition. He therefore introduced a bill which he thought might become a law, and asked that it be referred to the Committee on Corporations, which was done.

The bill having passed, it was called up again on March 30, for the purpose of reconsidering certain amendments. Mr. Belden said:—

The delegations representing the counties more directly interested in the Central Pacific Railroad are anxious that freights and fares on that road should be reduced; but they have come to the conclusion that it will be impossible to pass the bills introduced for that purpose during the earlier part of the session. A bill was then prepared by the railway company; it was reviewed and corrected by the several representatives of these counties, and it was agreed to support it by a portion of the delegations. The Placer delegation, however, disagreed, and objected to it in toto, but a portion of the Nevada delegation agreed to support the bill as the best thing that could be done for the benefit of their constituents. It was understood by the friends of the railroad company and by the Nevada delegation that this was to be a compromise measure. It was understood

that all the amendments that might be offered should be voted down, and the bill passed. The question as to who should take the responsibility of introducing the bill was raised between me and my colleague, and the duty was assigned to me.

The member here referred to denied this, and stated, moreover, that he had not agreed to support the bill at all. Mr. Belden was a young man and somewhat quick tempered, and it was not surprising that he should make use of very forcible language in expressing his amazement at this sudden change of views on the part of his associate, especially as the matter had been fully discussed and understood by all the members of the delegation.

However, unpleasant and annoying as was this matter, it was not without redeeming features, for all those who were best acquainted with the facts and the man hastened to prove their confidence in him by extending their sympathy and support. Indeed, so well established was his reputation that he lost by this occurrence not a single friend whose favor was worth retaining.

The preceding pages contain but a limited report of Mr. Belden's work in the Legislature. His hand is visible on nearly every page of the Statute books of that session. His experience as a lawyer and a judge had shown him the imperfections of the Code of Procedure and many measures of reform were suggested by him and adopted. He never avoided an issue, and his vote was invariably ready when called for. His opinions were always positive, showing that he had reasoned out every proposition upon which he was called to act, while his masterful eloquence invested the driest facts with interest, and compelled the conviction of his colleagues.

He was the acknowledged leader of the Senate, irrespective of party, and justly merited the verdict of having been in every respect a model legislator.

CHAPTER III.

AT the expiration of his Senatorial term, Judge Belden carried out his long cherished plan of visiting his Eastern home, and perhaps the Old World. Accordingly, in company with Mrs. Belden, he sailed May 30th, 1868, from San Francisco for New York, via Panama, on the steamer *Montana*, Captain Caverly. Among the passengers were Mr. C. T. Ryland, Mr. Paul Forbes, Mrs. L. L. Arnold, and many others who contributed in forming as congenial a company as ever gathered on shipboard. A member of the party who has since crossed the ocean many times recently remarked that the voyage on the *Montana* was the most delightful she ever experienced.

Mr. Belden did not confine himself to the quarters provided for the cabin passengers, but explored every portion of the vessel and was welcomed everywhere. His search for information was persistent. Neither the intense heat of the coal-bunkers nor the giddy height of the mainmast deterred him. So thorough were his researches that none of his fellow-passengers doubted his ability to navigate the vessel into port in case of emergency.

At Aspinwall, the party embarked on the steamer *Arizona*, Captain Maury, and so continued their journey to New York, which city was reached June 21st, the entire voyage having occupied three weeks. Mr. Belden was greatly impressed with the beauty of New York harbor, as well as the evidences of commercial prosperity to be seen on every hand.

After a brief stay in the city, the party separated, Mrs. Belden going to visit friends in New Jersey, while Mr. Belden proceeded to visit his old home in Newtown, Conn. Notwithstanding his unexpected arrival after an absence of fifteen years, he was readily recognized and warmly welcomed. His friends had heard of his success in California and were profuse in their congratulations. He visited all the haunts of his childhood and noted with mingled pleasure and pain the many changes wrought by time during his absence.

A few days after his arrival at Newtown he was joined by Mrs. Belden, and the summer months were passed in visiting friends in New York, New Jersey and New England.

A trip was made to Otsego County, New York, to see Judge Searls, his Nevada County friend, who at that time was residing there. From that place they went to Niagara, and thence by steamboat via Lake Ontario and the St. Lawrence to Montreal. This city Mr. Belden thoroughly explored and as a result, expressed a great admiration for it, especially on account of the substantial manner in which its buildings were constructed and its general appearance of stability.

From Montreal the two proceeded through Maine to Portland, and then to Portsmouth, N. H., to visit Mr. Belden's sister, Mrs. Berry.

Their next point was Boston, with which city he was much impressed, not only on account of its historic associations and the culture of the people, but by reason of its location and beautiful surroundings. It seems evident, however, that one distinctive feature was impressed upon him, for he was accustomed to say in latter years that Rome and Boston were the only two cities in which he could find his way without a guide, for if he only kept travelling he would in time get back to his starting point, while in right-angled towns the farther he went the farther he got from home.

While in Newtown, the annual commencement of Yale College occurred, and Mr. Belden visited New Haven for the purpose of witnessing the graduation of his cousin, Samuel Tweedy, and for the further object of making inquiries in regard to his own proposed course of study. He had a long interview with Professor Dutton on this subject at the conclusion of which the Professor told him that Yale had more need of him as a teacher than as a student. Mr. Belden evidently considered this decision as a final, and possibly a just one, as nothing more was ever said or done in regard to the matter.

In the latter part of September they returned to New York, but with no definite understanding as to their future movements. They had been in that city about four weeks when one morning about 11 o'clock Mr. Belden came into their apartments and, addressing his wife, said, "Kip, one of the Inman steamers sails to-morrow for Liverpool and the weather is getting very cold here. Suppose we take passage in the *City of Baltimore*." The suddenness of the determination and the shortness of the notice somewhat startled Mrs. Belden, but she was equal to the emergency and the next day, which was the 24th October, they embarked for Europe. The voyage was quite rough but uneventful. Mr. Belden was ubiquitous and appeared to ignore the various discomforts attendant upon ocean travel. The only thing he missed during the voyage was an iceberg which was sighted at night when he was asleep. He was greatly disgusted to learn the next morning of what had escaped him.

Their first sight of Europe was the coast of Ireland, which appeared on the 2nd of November. The next day they anchored in the Mersey. On landing at Liverpool, they went directly to the Victoria Hotel, but found that on account of a grand steeple-chase which was to take place the following day the city was crowded with people and all rooms had been engaged. He persuaded the landlord, however, to extemporize the necessary sleeping accommodations by which they were enabled to pass a fairly comfortable night. The greater part of the following day was devoted to an inspection of the Liverpool docks. Although the time was limited, he learned more of the plan and method of construction and system of operating than many other men who have spent weeks in a similar inspection. His verbal description of this great work, after his return home, was more complete and fuller of detail than any printed account which has yet been published in this country.

Taking the afternoon train for London and passing through a country which, from its fertility and high state of cultivation was greatly admired, they arrived at the metropolis in the evening of the same day and repaired at once to the "Charing Cross Hotel." It was their intention to proceed directly to Paris, but the weather being unusually pleasant just at that time, they tarried several days in London, recuperating from their rough sea voyage and visiting such places of interest as were accessible during the limited time at their disposal. Court was in session at the time of their visit to Westminster Hall, and Mr. Belden stopped to witness the methods of procedure, as the following note from his memorandum book indicates:—"Nov. 6th, Westminster Hall, Michaelmas Term, Court of Queen's Bench. Case of Bankruptcy. Stayed several hours. Sir George Cockburn, Chief Justice of England, on the Bench. Much bored by argument of counsel." Continuing, his notes read as follows:—"Nov. 7th, day pleasant. Went through the New Houses of Parliament, Westminster Abbey and then to Sydenham Court Place. Run over what would require weeks for a satisfactory examination. Sydenham is a wonderful place.

Sunday, Nov. 8th.—Went to church at Westminster Abbey and sat in the Poets Corner. Sermon from text, "If my brother offend me seven times shall I forgive him?" Went again in the evening. Sermon from 40th Psalm, 1st verse. Could hear but little and did not stay through the sermon.

Nov. 9th.—Lord Mayor's Day. Stayed to see the world-renowned procession. About two o'clock p.m. it passed Charing Cross. Queer old pageant. Went to Trafalgar Square and Westminster Abbey to see the crowd. It was wonderful. All seemed as a rule good natured. At five p.m. took the train for Paris, via Southampton and Havre.

Mrs. Belden, in speaking of these days, says:—"We of course, visited all the points of interest that travellers usually visit, and in addition, David always wandered off into the by-ways of the great cities to study the ways and habits of life of the people, a practice that caused me many an anxious hour. These researches, while they furnished much valuable information, were also the source of much amusement to him, for many a droll adventure he encountered which he used to relate as no one else could. But in London and Paris the misery and vice which he witnessed served only to sadden him."

Arriving in Paris on the 10th of November, they went to the Grand Hotel, at that time the chief rendezvous for Americans. Here Mr. Belden wrote to Mrs. Berry the following letter:—

PARIS, November 12th, 1868.

MY DEAR SISTER.—I had fully resolved to write to you before I left New York, but, true to my antecedents, I started for Europe upon half a day's consideration, and have to atone for my unfulfilled promise by inditing my first from this side to you. To briefly sum up my journeyings since I parted from you:—Mrs. B. and myself duly reached the "Hub" and located at the Revere House, and from this point we radiated in every direction for a week, and as a result, flatter ourselves we "did" the great city of "Bosting." We went up the monument, into Fanueil Hall, through Quincy Market, out to Mount Auburn, into the Museum, heard the great organ played, and, in short, whatever the most enthusiastic devotee of Boston even hinted was worthy of notice, we at once hunted out. After paying our respects at the shrine of all true Yankees, we went to New York, stayed there about one week and then up to Newtown. Made about the same stay there, and then back to New York, where I remained till October 24th, when we sailed on the *City of Baltimore* for Liverpool. Had a very pleasant voyage. My wife and self were seasick only a few hours, though much of the way it was quite rough. Looked about Liverpool and saw its famous docks, well worthy all the commendation they receive. St. George's Hall, another of the special lions of the place and a very fine building. Then started for London, intending to remain there only a day or two, but finding that the Lord Mayor's Show, namely, the grand procession of the newly elected mayor, from Guildhall to Westminster Hall, would come off the following Monday, I stayed to witness that relic of ancient splendor and pomp, employing the interval in visiting such points of interest as were in the vicinity of Charing Cross Hotel, where we lodged. I would like to give you my ideas of these places, but I saw so much of the very highest interest that the superabundance of material confuses me. Westminster Hall, Westminster Abbey, the New Houses of Parliament, Whitehall, Buckingham Palace, and many other places of the greatest historical interest were within five minutes walk of my hotel, and, of course, received a liberal portion of my attention. As a lawyer, Westminster Hall had a special claim, and I passed nearly two days in the several courts over which Blackstone, Coke, and the great luminaries of the profession had presided, watching the arguments and listening to the judgments of their successors. I visited the great Hall of William Rufus, where Charles I. was tried and adjudged worthy of death by our Puritan ancestors; where Warren Hastings trembled while Edmund Burke blazoned the wrongs of India, and where now the Peers of England sit in judgment on titled culprits; in short, where all that is great in the jurisprudence of a great nation had its origin. It was something to stand in this ancient hall and under the quaint old roof with the carved heads that had looked unchanged upon the generations of nearly a thousand years. It was something more than timber and stone that would rise before me whether bidden or not, and the history of the past will have a keener interest for me in the future for having stood before the places and seen the theatre in which it was enacted. From Westminster Hall it is not over five hundred yards to Whitehall, where Charles I. was beheaded. I saw the window from which the scaffold was erected, and through which the ill-fated king walked; and I stood upon the very place where, for all time, the responsibility of a king to his people was so boldly, so nobly established. I have since seen the Place de la Concorde, in this city, where the guillotine of the French Revolution swept away the Bourbons; suggestive places, both of them, and I should hardly think that Royalty in either country would like to recall the reminiscences suggested. I was surprised to find Westminster Abbey so fine a building in an architectural point of view. I had supposed that it was principally, if not exclusively, interesting from its associations, and particularly from the illustrious dead it contains. Of course both these facts add greatly to the interest that a visitor must feel in the place; but the building itself is a magnificent one—far beyond anything I had ever seen. Trinity Church, New York, is a petty parody upon it, but that is all it is. I had supposed that the world was progressive as well in architecture as in the other sciences, but a comparison of the modern structures I have seen with the ancient edifices does not warrant this opinion.

The Lord Mayor's Show was interesting as a relic of ancient customs, and for the antique costumes that appeared in the procession. I suppose the several characters that appeared in this grotesque pageant were the same in garb as those who accompanied Richard Whittington upon a like occasion, and I know that the cumbrous, rickety old chariot, gorgeously gilt, and ingeniously awkward and uncomfortable, has jolted the bones of every Lord Mayor for the last six hundred years, and that the same gaping, vociferous crowd have welcomed its progress year by year for centuries. Much that was really absurd, and that practical America would deride, I looked upon with complacency, not to say respect. But the crowd that gathered—that was wonderful. I took one of the little cabs, and the driver went around Cheapside and London Bridge, Trafalgar Square, Westminster Place, and other points where it was supposed the procession could be seen to advantage. Everywhere one surging mass of humanity. Acres upon acres of men and women. Miles and miles of streets packed solid with the sight-seers of this great city. And then as the carriage passed, and the mob, howling and angry, came surging up behind or swept through the side streets to get some new position in advance of the procession, it seemed more like the waves of the sea than a mass of men. I thought I had seen crowds, and could comprehend what a mob must be, but I had no idea of it—of its wonderful resemblance, when thus combined, to a mere homogeneous mass, in which there was no will or volition, but where all swept on like the waves of the sea in one current, till I saw it in London.

The Lord Mayor's Show over, we started for France. The trip across the Channel was a trifle to two such seasoned voyagers as my wife and self, but I saw plenty to whom it was evidently a very disagreeable novelty. The steamer was dirty and mean, and the sea quite rough. At Havre we took our first breakfast upon the old Continent, and Mrs. B. tried her French upon the waiter. Alas for the boasted culture of Napoleon's subjects! The modern Gaul who brought us our repast did not know his own language, though, strange to say, he had a slight smattering of English. The journey from Havre to Paris was through a country that must, in summer, be beautiful. It is very pleasant now, and this is the disagreeable season here. The culture was far beyond anything I had ever seen, and the custom of planting forest trees and then building among them, coupled with the peculiar appearance of the thatched houses and neat door yards, gave to the country a very picturesque and pleasant appearance. In all the fields women as well as men were at work, rather more of the former than of the latter, and very cheerful and happy too, most of them looked. Still, it scarcely agreed with my notions of propriety to see them in many of the positions in which they are employed here. I wish Susan B. Anthony, and strong-minded women of that ilk, could see how their French sisters are practically illustrating what they so pertinaciously teach. In one respect, at any rate, the French are far in advance of us. They do employ their women as clerks, saleswomen, and in all possible in-door vocations. At the Grand Hotel, and in all the offices, women are employed as clerks. In all the shops (and their name is legion) you see women making sales and attending to business generally. And a great many are thus employed.[*] In a shop, which in New York would be attended by two clerks, they will have here about six, and they seem to distribute their attention between waiting upon customers and manufacturing some of the thousand novelties for which Paris is famous. The whole institution seems to be conducted upon a sort of family system that is very peculiar, and which struck me very pleasantly.

Of course I stopped at the Grand Hotel; all Americans do. And it is indeed a very immense and grand affair, conducted upon the European plan.[†] Everything is priced—down to a candle, and you pay for what you get. You may have as many or as few meals as you please at the hotel. You pay so much per day for your room, and for just what dishes you order. You may get a comfortable meal for four francs, or eighty cents; or you may make a very sumptuous one for ten dollars. . . .

(The letter here terminates abruptly, and gives evidences of never having been completed or mailed.)

Mr. and Mrs. Belden remained in Paris about ten days, devoting themselves assiduously to sight-seeing and visiting the chief points of interest in that city. It was their intention to remain several days longer, but the weather became so unpleasant that they finally concluded to act upon the advice of Mr. Paul Forbes, whom they accidentally met at this time, which was, to go South, and return to Paris in the spring. Accordingly, on the 21st of November, they took the train for Marseilles, arriving in that city after a ride of eighteen hours, during which stops were made at Lyons, Avignon and Arle. The country round about Marseilles proved to be more rugged and picturesque than they had anticipated, while the city itself, with its harbor, reminded them much of San Francisco. During their stay here the rains were so continuous that Mrs. Belden was unable to pass much time out of doors. Mr. Belden, however, was not deterred by the weather. He purchased a pair of field-glasses, and what he had not time to visit in person he viewed at a distance.

His favorite resort was the dock and the harbor, where he watched the shipping and noted the quantity and variety of the produce which was being constantly brought to that port. He was no less impressed by the economical habits of the people here as well as in the other cities of that country. He mentions having seen in this city old women picking peas and grains of wheat out of the cracks in the pavement.

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[*] At this time positions of this character were not open to the women of America.

[†] Hotels on the European plan were rare in this country at this time.

Some years before this, while practicing law in Nevada, he had for a client a Frenchman and recovered a judgment for him, which the defendant insisted on paying in greenbacks, then worth about forty cents on the dollar. The Frenchman had no confidence in paper money and considered the whole debt an entire loss, nor could his attorney convince him to the contrary. Finally, Mr. Belden, in order to convince him of the value of our currency, offered to purchase the judgment and pay coin at the market rate of greenbacks. This offer was gratefully accepted by the client and the sale was consummated. Shortly after the value of currency advanced to sixty-five cents on the dollar and Mr. Belden summoning his client paid him the twenty-five per cent. additional, which amounted to a considerable sum. It was money to which the Frenchman had no claim and which he did not expect, and with many thanks he received it and departed. While walking along the streets of Marseilles, Mr. Belden met a party of gentlemen and stepped to one side to permit them to pass. As he did so, one of them detached himself from his companions and rushing forward threw his arms around Mr. Belden's neck, kissing him on both cheeks and calling him his savior and benefactor. Then motioning his companions to approach he introduced Mr. Belden to them as "His Most High Excellency, the Chief Judge of all the great country of California." The latter recognized his old Nevada client and returned his greeting and likewise the salutations of his friends, with dignified cordiality. It seems that the money which Mr. Belden had saved for him had enabled him to return to France, where he had made some fortunate investments and was now living at ease on the income therefrom. The man's gratitude was boundless and he could hardly bear to have his so-called benefactor go out of his sight. The affair became somewhat embarrassing to Mr. Belden, but he effected a compromise by accepting an invitation to dine with his client. This engagement he fulfilled and met not only his host, but twenty or more of his friends and relatives, each of whom insisted on kissing him and in other ways expressing their great gratitude and respect. The dinner, according to his report, consisted of a large number of dishes of which he could not eat and a long list of wines which he could not drink. However, he made them a speech which, owing to the absence of any interpreter, was duly impressive.

EXTRACTS FROM JOURNAL.

Went on board the little steamer *Durance* and were notified that she would sail at eight o'clock precisely. After an immense amount of excitement and confusion we got off at 12 m. Passed Chateau d'If, where Dumas' "Count of Monte Cristo" was confined. It looks as he describes it. Coast of France thickly studded with towns and olive orchards. Boat very pleasant and wife and I have it to ourselves pretty much.

Nov. 26th.—Still coasting down the shores of Italy. Rainy and cold. Reached Genoa about 4 o'clock p.m. Raining so hard we could see nothing of the city. Carried away boom getting into the harbor. Much disgusted with things generally. Mrs. B. furious at Italy, France, the boat and myself.

Nov. 27th.—Awakened by a dash of water from an old sail coming in at the window and wetting clothing. Got up. Morning cloudy but not rainy. Went on shore with a party. Saw many magnificent churches and palaces. Fine promenade on the marble terrace and queer streets from four to ten feet wide. Ran around the city till dark and went on board tired but pleased. Some musicians came on board and played and sang.

Nov. 28th.—Morning very pleasant and bright. Up and on shore early and took train for Pisa twelve miles out. Went to Cathedral, Campo Santo and Leaning Tower and up the latter. Then to a studio and saw many pretty things and bought some trifles. Back to Leghorn and around the town for several hours, then on board. Left harbor about 5 p.m. A singularly pleasant day.

Nov. 29th.—At daylight this morning were in the harbor of Civita Vecchia, the port of Rome. Did not go ashore as the captain was in a hurry and did not wish to chance delay. Sailed out about 10 a.m. About 2 o'clock off the mouth of the Tiber. Saw the dome of St. Peter's about sixteen miles inland.

EXTRACTS FROM JOURNAL.

Among Mr. Belden's papers was found the following unfinished letter written by him at Rome, Dec. 20th, 1868, which gives an interesting review of places visited.

J. CASHIN.

My Dear Sir,—I intended writing as soon as I should arrive in this city, but have delayed so doing with the hope and expectation that I should receive both letters and papers from California. As neither are forthcoming I shall assume that they have been sent and have miscarried, or are yet on their way, and will give you a brief history of our movements, since I last wrote you. My wife and self were in Paris from the 11th to the 21st of November, sight-seeing all the time, and intended remaining in Paris until spring and then taking a run through Italy, but the weather became very cold and friends who were posted advised us to visit Southern Italy in the winter. The cold and counsel prevailed and upon the 24th we started for Marseilles. Remained there for three days and then started upon a coasting steamer for Naples. These steamers touch at all the principal ports upon the coast, lying in the harbor during the day, taking in and discharging cargo and sailing at night, thus enabling passengers to spend the entire day on shore and to visit whatever of interest is to be found. Besides this they keep so close to the shore that a fine view of the coast is constantly enjoyed, and as cities, villages and picturesque ruins are continually in sight, the traveller's interest does not flag. I do not think I ever passed five more pleasant days than those thus spent floating down the shores of Italy. The first and second days out were stormy and unpleasant, but the morning of the third shone bright and balmy upon us in the harbor of Genoa. We were on shore from sunrise till after dark, through half a dozen splendid churches, two fine palaces, several public gardens and saw the city generally. The next morning at an even earlier hour, we were on shore at Leghorn, taking the cars for Pisa, famous in all the school-books for its Leaning Tower and magnificent Cathedral. We climbed the Tower, went through the Cathedral built in part from the ruins of two heathen temples; through the cemetery (Campo Santo), where the earth in fifty-two ship loads was brought from Mount Calvary; in the Baptistry where the columns and cornice two thousand years ago did similar service in the Grecian Temple of Minerva. Then back to Leghorn and around the town till night admonished us we must return to the steamer. The next morning found us in the harbor of Civita Vecchia, the port of entry for Rome; but, as we were to stay there but a few hours and our passports must needs be inspected, we did not go on shore. About 10 o'clock we steamed out of the harbor and on down the coast. The day was beautiful and about 2 o'clock we were off the mouth of the Tiber and the mighty dome of St. Peter's loomed up on the horizon fully twenty miles distant. Naught else of Rome was visible and for several hours this majestic structure seemed to be moving with us along the blue horizon. There were castles, villas and villages upon the shore, many of them striking in appearance and apparently of great magnitude, yet far above them all swept the great dome. I have since then been in and around St. Peter's and have viewed it from every attainable point, but nowhere has it so impressed me with its magnitude, its superiority to all the other structures of the world, as when I first watched it from the distant sea Early the next morning we were in the harbor of Naples and just across the bay was Vesuvius, a column of smoke arising from its summit to the very clouds, being all that was to be seen of the great eruption. In Naples we remained a week. The weather was delightful—much like October weather in California. The many places of interest kept us constantly on the move. If I ever knew, I had forgotten that there was so much of interest here. Vesuvius and Pompeii I was prepared for, but the country all around the bay is stored with monuments and ruins of cities more ancient than Rome, if not so extensive or magnificent. Near Baiae we were shown the arches and domes of Grecian temples erected before Rome was founded and whose ruins to-day seem likely to remain as long as the Coliseum of the Eternal City shall endure. Of one of them, called the Temple of Minerva, the dome is almost as perfect as that of St. Peter's. While we were in it, a troop of minstrels of the country made their appearance and proposed to dance the "Tarantula" for our amusement. Mrs. B. not having any respect for Minerva, we seated ourselves upon a fragment of an ancient column and directed them to proceed with the entertainment. Away they went—three women and a man; round and round they whirled to the music of a tamborine that a fourth woman was playing, for about a quarter of an hour. A traveller in this ancient land is expected to overflow with emotion. If I had the emotion, I declined to overflow, but I could not help recalling in retrospect, a wonderful past and thinking of many things, and I never expect to witness another dance under as suggestive circumstances. It would be worse than useless to attempt in a letter, a description of Naples and its environs. Pompeii itself would take a volume and it is but a fraction of what is to be seen. The whole country is a mass of ruins. Walls crop out of the hill sides; bits of tessellated flooring with a hundred feet of ashes and earth above them, show themselves in the cliffs. Vineyards are enclosed by the walls of temples that have served as quarries and brick-yards for a thousand years. Columns are built into the rough walls of the country or support the roof of a barn or the gateway of a cattle-yard. Everywhere and upon every hand appear these gigantic evidences of what was * * *.

Nov. 30th.—Went ashore at Naples and took up our abode at the "Hotel d' Amerique." Then took carriage to Pompeii and Herculaneum, returning at night. Bay of Naples beautiful.

Dec. 1st.—Walked about and visited several churches and the Museum. The collection from Pompeii very fine and complete. Churches not elegant—much better in Genoa. Visited Chapel in which the blood of St. Januarius was kept.

Upon reaching the Chapel of St. John the Baptist they learned that ladies were not permitted to enter; the gentlemen, however, were allowed to go inside and did so. For weeks afterwards, Mr. Belden often attempted to excite the curiosity of his wife by darkly alluding to the wonderfully mysterious things encountered at this place, and regretting that she had not been permitted to see them nor him to reveal them. Ever after this, when he would be relating some story of his European adventures, Mrs. Belden would take her revenge by quietly remarking that the incident related must have occurred at "St. John the Baptist's," thus intimating that he was exaggerating the facts.

Dec. 3rd.—Started with guide and carriage for Baiae and vicinity. Visited Crater of Solfatara. Amphitheatre of Pozzuoli Temple of Serapis. Lake Avernus and Sybil's Cave. Temples of Apollo, Venus and Mercury. Had dinner and then went to the great Reservoir. Old tombs of Cumae with Greek and Roman ruins on every hand. Returning, went with party in evening to Campo Santo.

In describing their visit here, Mrs. Belden writes:—

Our day had its comic side. This was our first introduction to the streets of Naples, and the latter are indeed a study for a Hogarth. The teams particularly attracted our attention. They were of all descriptions. There were little donkeys and big; horse and donkey; four donkeys all of different size; donkey and cow; two cows and donkey. So infinite was the variety that David remarked that he had now seen everything harnessed but a woman and an alligator. The museum of Naples is, of course, a very fine one, as most of the treasures of Pompeii and Herculaneum are gathered there. Antiquities of all kinds and things which illustrated the habits of the ancients had a great charm for David. He was no less interested in the customs and daily life of all classes of people wherever we went and most of his time was devoted to researches of this character.

On the 5th of December the party proceeded to Rome, where Mr. Belden made the following notes:

Dec. 6th.—This morning tried to get mail but failed. Went to St. Peter's. Watched my wife and Mrs. Taylor pin up a chap's coat so he could get into the Sixtine Chapel. He failed, to our great amusement.

The person here referred to was an Englishman who attempted to gain admission to the Chapel, but was repulsed by the Major Domo because he did not wear the regulation "dress coat." The ladies sympathized with him and, after a consultation, concluded that by a judicious use of pins they could simulate the desired garment. But notwithstanding the expenditure of a great amount of ingenuity and a larger amount of pins, their effort was a failure and left them disgusted with a community where a man's social standing was determined by the cut of his garments.

Dec. 7th.—Wife not well. Went alone to St. Peter's. Stood on the Bridge of St. Angelo, on pedestal of statue to the right as you approach the castle, and saw the Pope pass to the Church of the Holy Apostles and again as he left for the Vatican.

It was at this time that he unexpectedly met some old friends. He had been on the tramp all day and was tired and hungry. Not wishing to abandon his sight-seeing long enough to visit a restaurant he purchased a piece of honey-cake from a street vendor with which he mounted the pedestal of a statue where he could overlook the crowd while satisfying his hunger. While occupying this prominent position in Roman society a carriage was driven up and halted just beneath him. The occupants of the vehicle were two gentlemen whom he immediately recognized as Peter Donahue and Judge Hastings of San Francisco. "Hello, Uncle Peter," he called out, "if you come up here you may have part of my cake." The gentleman looked up in amazement, but recognizing the speaker, burst into a fit of laughter. Mr. Donahue was a bluff, hearty old gentleman who especially enjoyed a good joke. Judge Hastings, on the other hand, was very dignified in his deportment and very particular as to his dress, in which latter peculiarity he received no sympathy from either of his companions.

It was during Carnival time, and the reckless merriment was at its height. These three were on the street one day when an idea struck Uncle Peter. He engaged Mr. Belden to walk Judge Hastings under a certain window in an adjoining hotel where he lodged. Then procuring a basket of confetti he ascended the stairway, and, when Hastings came within range, he emptied its entire contents on his head. The effect was electrical. The appearance of the Judge was changed in a moment from that of a beau to that of a venerable Santa Claus or a dilapidated miller. His immaculate tile was jammed down over his ears and twisted out of shape, while his general appearance indicated a recent bath in a flour barrel. Uncle Peter hugely enjoyed his little joke on the Judge, and would frequently refer to it in after years with renewed relish.

Started with some chaps to-day for a tramp. Saw the Forum, Column of Trajan, the Coliseum and many churches; among the latter was St. Clement's, where there are three chapels, one under the other. Also visited the Rotunda (St. Stephani) and other places, some of them of interest and others not particularly so.

Mr. Belden notes in his diary a visit to the Columbaria and states that he secured "the loan of a lamp, the unostentatious manner in which the presentation was made rendering the gift particularly acceptable." The facts are these:—The lamps are those found in the ancient tombs, and are on sale at various places in Rome. He had purchased several of these, but was in doubt as to whether he had not been imposed upon by imitations. He thus desired to procure one of undoubted authenticity. It happened that on his visit to the Tomb of the Cæsars he saw a number of these lamps ranged on a shelf, but they were jealously guarded and could not be purchased. There was one member of the party whom the custodian of the place seemed to strongly suspect of a desire to purloin some of the relics, consequently he devoted his entire attention to him. While the guardian was thus employed Mr. Belden gradually backed up to the shelf with his hands crossed behind him and quietly dropped one of the lamps into his pocket. This was the "unostentatious manner in which the presentation was made." When he left the place, however, he dropped into the custodian's hand a gratuity large enough to cover twice the value of the article taken.

Dec. 9th.—Wife, self and party went to church at the Lateran and saw many relics. Scala Sancta with people going up and down on their knees; Sta. Maria Maggiore and a number of other fine churches. In the Lateran chapel saw a fine group of statuary and the tomb of a Pope.

Dec. 10th.—Went to the Palace of the Cæsars and to many churches; among others, the one that suggested to Gibbon his history.

While he was thus employed, Mrs. Belden and her friend Mrs. Taylor went in search of apartments, but were unable to rent those which they desired for a shorter period than two months. As the Beldens had arranged to stay in Rome but one month, Mrs. Belden returned to consult her husband. Not being able to find him, however, she concluded to take the responsibility of signing the lease, which she did, thus extending their sojourn thirty days longer than was at first intended. Mr. Belden made a standing joke of this business operation, pretending to be greatly alarmed that his wife should have signed a contract with the terms of which he was not acquainted. He was wont to say that he would not be surprised to learn that it was an obligation to pay the national debt of Italy, and that it haunted his dreams like a nightmare during his whole stay in Rome.

These new quarters were in the Via della Angeli Custodii, and after so long an experience in hotel life they were thoroughly appreciated.

FROM MRS. BELDEN'S JOURNAL.

Dec. 11th—Soon after breakfast went with Mr. Matthews and others to drive on the Appian Way. Stopping first at the Tomb of the Scipio's and the Columbaria of Julius Cæsar, we passed the Tomb of Cecilia Metella and stopped at the little church where tradition says that the Saviour met St. Peter when he was fleeing from Rome. Here we bought some rosaries. Went into the Church and Catacombs of St. Sebastian. Afterwards drove out on the Via Appia beyond where the Horatii and Curatii fought. Some distance from here is the tomb with the garden and house. We returned by way of St. Paul's (beyond the walls), a marvellously beautiful church. We visited the Pyramid of Caius Cestus and the graves of Shelly and Keats, including other places, and, returning, dined sumptuously in our new abode.

Mr. Belden visited the Church and Cemetery of the Capuchin Friars, and there gathered information which he embodied in a short descriptive article, which is here appended. He writes :—

The most unique if not the most interesting of the sights of Rome is the cemetery of the "Capuchin Friars" attached to the monastery of that order. It occupies an enclosed and covered area of about one hundred feet in length by about thirty in width. This space is divided into six arched apartments standing in a line and opening upon a corridor. The floor of these apartments is of earth brought in the eighth century from Mt. Calvary, Jerusalem, and the space within each of the six chambers is filled with the graves of the recent dead of the monastic brotherhood who fondly hoped in that hallowed earth for more peaceful rest than could be found in meaner clay. But as the great reaper gathered generation after generation into this garner, it was found that this space was too limited for the endless procession that was journeying thither; that the bones of the sleepers cumbered the ground, and that unless some change were made, the brotherhood of the future must seek their kindred dust in the common soil of the Campagna. Modern philosophy would have told them that this made no difference, and modern selfishness would have hustled its predecessors' bones into some obscure hole, and then have laid itself to rest in the cool bed of its dispossessed predecessor. Not so, thought or did our barefooted friars, and they piously, as well as ingeniously, devised and carried out a plan, by which all of their order—the future as well as the past—should share and share alike this coveted resting place.

They collected from the soil all the bones that remained of the thousands there interred, carefully cleansed them, and then, with a patient assiduity, and a fertility of invention really wonderful, proceeded to line and decorate the walls and ceiling of these apartments with them. It can scarcely be imagined how, with materials ordinarily so repulsive, so much that is interesting and ingenious could be made, without shocking or horrifying the observer. But here this very difficult task has been most successfully accomplished, and those accessories of the grave, that survive corruption and the worm, appear relieved of every repulsive feature. Each room is arranged and decorated as a religious chapel. At the end is a picture or image of the Virgin. The shrine in which it stands is walled and arched with skulls. Over it two skeletons support in their fleshless fingers a crown made wholly of bones. Before this image hangs a lamp, its cup a skull, its chains necklaces of bones, while upon either hand, arranged with most artistic skill, are vases, crucifixes, and all the adjuncts of a Catholic altar, all of the same ghastly material. Festoons, wreaths and rosettes, in every variety of form, depend from the ceiling, decorate the walls and twine round the columns. Ribs joining ribs, creep along, in fanciful semblance of a vine, with leaves, and buds, and blossoming flowers of the bones of the spine, the fingers and the teeth. All that piety could bring to the decoration of an altar, or pride to the adornment of a palace, is faithfully reproduced, and all from these spoils of the grave. Winged cherubs grin at you from the doorways and peer at you from the cornice—the head a skull, the wings a skilful arrangement of shoulder-blades—vividly suggesting those figures upon ancient tombstones that puzzle the beholder to determine whether it is a cherub that smiles or a demon that scowls upon him. The sides of the rooms, as high as the ceiling, are filled with skulls and large bones, arranged in alternate layers, and with the utmost regularity, and in these walls of bones, are alcoves arched with skulls, in which, standing, kneeling, and lying, are the skeletons of those of the brotherhood who, having slept their allotted four years in the sacred soil, have given their beds to others, and their bones to the artistic hands of their former brethren. There they were, each in the coarse brown frock—their dress living, their shroud in death—their sightless sockets turned toward the crucifix, which each held in his fleshless hand, while the position in which accident had placed them, portrayed in them dead, every sentiment which might have moved them when living. Here was one with his head inclined upon his breast, as though in deep meditation; another, his head thrown back and his eyeless sockets upraised in rapt adoration; another leaned forward with all the earnest eagerness of religious fervor; while another, with his head waggishly to one side, seemed to hardly need eyelids to wink at you, and convince you that his empty skull was in fact a mine of most exquisite humor. As painters show that by a single stroke of the pencil the whole nature and expression of a portrait may be transformed, so here, by the slightest difference in position, every condition and passion was depicted. Here hope, there despair; here devotion, there sardonic malice; in the one stolidity, another levity or facetiousness. It was a wonderful study, that grim array of old, dead fleshless monks that smiled and lowered and jeered upon you.

It was the mockery of death; the saturnalia of the grave that was about you. Scarcely less interesting was the old friar, yet in the flesh, who introduced us to the brethren gone before. For over thirty years, he told us, he had been there, and that many of the mummies, and the rattling skeletons that were to us but objects of wondering curosity, or of idle speculation, had been to him companions and brothers; and as he pointed them out, and told us who and what they were, how he had loved them living, and cherished their memories dead, tears streamed down his cheeks and showed that neither monastic life, nor constant companionship with the shapes and things of this weird charnel house, had frozen his heart or blunted his sensibilities. A strange life and a suggestive one, that of our guide. He knew that before many years should pass, he too would be laid in his serge frock in the soil at his feet; that his bones would wreath and festoon the walls about him; that another in his place, would guide the curious and the scoffing through these same walks; that for generations the stream of gazers would flow on, and that all these years his bones would be the grotesque and fanciful garniture of these rooms, and that his sightless sockets would glare from these walls upon this endless procession. And yet he seemed neither solemn or sad. He breathed a prayer as he paused at an altar; he dropped a tear as he recalled the friend and the brother; then with a smile of complacent pride he called our attention to some ornament of special ingenuity or beauty, and with a most cheerful look, accepted our gratuity, and dismissed us with his blessing at the door of the cemetery.

FROM MRS. BELDEN'S JOURNAL.

Dec. 13th.—Went to the little "Church of the Guardian Angel," which names our street. David went with me to early Mass. In the afternoon went to the Catacombs of St. Agnes with Dr. K., Mr. M., and another doctor. After leaving the Catacombs we visited the Church of St. Agnes, built over the place where the body of this saint was found. Her remains are in the crypt. Dr. Chatard, of the American College, called in the evening, a compliment we much appreciated.

Dec 14th.—Have just returned from the Vatican. Went first to the Sixtine Chapel and saw Michael Angelo's great picture, "The Last Judgment," and others by the same artist. Next, to the Museum, and saw so much that our eyes and heads ached; "The Nile," "Apollo Belvidere," the wonderful "Laocoon," and much else. The Doctor and David had quite a discussion about Demosthenes. The Doctor insisted that he had a remarkable head, while David contended that it was very ordinary. We spent a short time looking at the tapestry pictures from Raphael's cartoons.

Dec. 16th.—Went to Rospigliosi Palace with David and Mrs. Taylor, to see Guido's celebrated "Aurora, scattering Flowers before the Chariot of the Sun." David insisted that the horses were too heavy for that kind of work. We went to the Quirinal on Monte Cavallo, but having forgotten our permit we could not gain admittance to the Palace. But we visited the lovely gardens, and afterwards went to the Barberini Palace to see the "Beatrice Cenci." Leonardo was making some very good copies of that sweet but too often copied picture. Visited his studio this afternoon.

Mr. Belden, in company with Mr. Matthews, went one day to Ara Coeli to see the beggars get their noon-day meal. The practice is for each applicant to bring a large bowl and spoon to the gate of the Convent at the appointed time, when one or two of the monks appear, bearing a large kettle of soup or porridge. The kettle is then put down, the monks drop on their knees, and all present kneel. After a short prayer, the distribution commences. Every one has his bowl filled, and eats it on the convent steps, or takes it away, as he pleases. Mr. Belden, being curious to know what the food was like, went into a neighboring shop, purchased a bowl and spoon, and took his place in the line. The monk motioned for him to come up first, but he refused, and, having waited his turn, obtained the portion desired. Having tasted a few spoonfuls, he gave the bowl, spoon and contents to a little girl who seemed most of all to need a new dish, remarking that it was pretty good food for a hungry man. The one presiding at the distribution was much interested in these procedures, and, after the repast, invited him to look through the convent. Accordingly he and Mr. Matthews entered and were shown over the institution and much of the history of the Convent and Church of Ara Coeli was related to them. Among other things they learned how the food thus distributed was obtained. One of the Brotherhood obtains from the wealthy families of the city the victuals that would otherwise be wasted, and which it is the custom of some to save for this purpose. When all is collected they sort out the meat and vegetables and such things as can be made into this decoction. They are accustomed to feed at each monastery a certain number and they thus become acquainted with each applicant.

FROM MRS. BELDEN'S JOURNAL.

Dec. 17th.—This morning started out quite early. Met Mr. M. and the Doctor at the foot of the stairway and turned our steps towards the Capitol. Only a portion of it was open to-day. After looking at "Pliny's Doves" and "Venus" (of the Capitol), we went across the street to the gallery of paintings. The latter were not of the highest order though some of them were very good. The frescoes were especially interesting as they illustrated the principal events in Roman history. I found it a very easy way to learn history, for David, who was in his element, gave me much instruction. We went to look at the statue of Marcus Aurelius in the centre of the piazza of the Capitol. It is very celebrated and very ugly. Went from here to the Borghese Palace. This has a very extensive gallery, which contains many good pictures.

Dec. 18th.—David and I went off by ourselves this morning and wandered around until we were again at the Capitol. This time we found it open and saw all the statuary we had not already seen. The "Dying Gladiator," for which David expressed the greatest admiration, the "Marble Faun," "Antinous" and others. Mr. Matthews and the Doctor joined us while we were in the "Gallery of Busts," and the usual discussion of the merits of the different heads went on. From here we went to the Pantheon and walked in and around the spacious building, then took a carriage to the Cappucini and saw Guido's picture of "St. Michael and Lucifer" and other good ones representing scenes in the life of St. Francis, by Domenichino and others. Under the church is the burial place of the monks and a strange old place it is. Dr. Chatard called while we were out, much to our disappointment.

Dec. 25th.—Christmas. Ever memorable. We attended High Mass at St. Peter's, offered up at the High Altar by the Pope, assisted by many Cardinals. Ceremonies grand and imposing and occupying three hours. Music very fine. We were also here at three o'clock this morning to a service held in the Chapella del Cora. Chanting of the "Shepherd Song" by the choir. David thought this the most impressive visit he had made to St. Peter's. The partial illumination seemed to add to the immensity of the edifice. After High Mass I rested but David went up to Sta. Maria Maggiore to the procession and celebration. After dinner he took Mrs. T. and myself there to witness a continuation of the ceremonies, but we were too late, so drove around to the Coliseum to view this grand old ruin by moonlight.

Dec. 29th.—Up early this morning and soon after breakfast were in our court robes and on our way to the Vatican. On arriving there, we were shown, after a short delay, into the presence of His Holiness, Pius IX. We were all delighted with him. After the presentation he made us a little address and bestowed his blessing upon us and upon our chaplets and crucifixes. We were then dismissed. Having a permit for the mosaic manufactory we concluded to visit it while in the Vatican. We found them working on the portraits of the Popes for St. Paul's. We were all much interested in watching the process. Some exquisite work is done here. The copy of the "Madonna della Seggiola" which was at the Paris Exposition is here at present. We also visited the "Pinacotheca," which, though not so extensive as many others, contains the "Transfiguration" and "Communion of St. Jerome," which are of themselves sufficient for any gallery. David and I then went again to dear old St. Peter's, which we never tire of visiting and where we passed about two hours.

It would be impossible and perhaps unprofitable to enumerate all the places visited by the party during their stay in Rome. However, the extracts from Mrs. Belden's journal given above indicate how industriously they pursued the work of sight-seeing. Every hour in each day was fully occupied and profitably spent, as they had the advantage of intimate association with Dr. Chatard, who had been a resident of Rome for many years, and was a veritable cyclopedia of all facts pertaining to that locality.

During his two months' residence in Rome Mr. Belden made excellent use of his opportunities. Having visited all the chief points of interest, including those noted in the guide books, he then made his way into the more secluded and almost inaccessible nooks and corners of the city, where he became acquainted with new phases of Roman life, and acquired a more intimate knowledge of local manners and customs. His quests were never fruitless, for wherever or however often these visits might be made, he invariably returned with something—a discovery, a bit of word-painting, or an amusing anecdote with which he was wont to entertain his friends. While the newer part of Rome was not neglected, he devoted most of his time to the ancient portions, where he was enabled to indulge his fondness for antiquities of all kinds, in the history of which he was thoroughly versed. It is unfortunate that his journal, which is, in fact, only a bare outline of localities visited, could not have been elaborated by him with the various scientific, historical and literary facts with which his mind was stored, and which he was so well fitted to impart.

After the first few weeks, certain localities acquired for him a particular interest and indeed fascination. One of these was the Coliseum. Many hours were devoted to the study of that wonderful structure. It was considered in detail and from every point of view. He invariably turned away from it with reluctance and, after the day had been passed in the pleasant rounds of sight-seeing, his thoughts would again revert to it, and he would wander back again to look upon its sunken arches and broken columns as, in the moonlight of winter, they cast their shadows across the vast and silent arena.

St. Peter's was naturally an unfailing source of interest and pleasure. Many were the days passed about and within its walls, and from each of the Seven Hills and from every point of advantage he was accustomed to study its dome as it towered above the housetops of the city. As many of the important religious festivals occurred during the period of his visit, this church offered additional attractions. Not content, however, with the services of the day, which were attended whenever opportunity allowed, he used to visit many of the evening celebrations also, in order to hear the music of the Gregorian Chant, of which he was very fond.

As the days drew to a close he was accustomed to walk over to the Pincian Hill where from its terrace he viewed the beautiful sunsets. This spot, which commands one of the finest views of the city and which in the early evening is a favorite resort for all classes, he found peculiarly attractive.

As a matter of course, so active and persistent a sight-seer as Mr. Belden became after a time a well-known character in the streets of Rome, as the following amusing anecdote will serve to show. He was very fond of roasted chestnuts and would fill his pockets in the morning and eat them through the day as he wandered about. Mr. Matthews, who had been his daily companion for several weeks and had heartily enjoyed his society, finally left the party and went down to Naples for a short time. While there he met a gentleman who, he felt certain, would take great pleasure in knowing Mr. Belden. Accordingly, he told him that when he went to Rome he must look him up. The gentleman said he would do so with pleasure, and asked for his address. "Oh," said Matthews, glad of an opportunity to perpetrate a joke on Belden, "you don't need any address. You will be sure to see him—a large man, dressed in grey, and wandering about the streets eating chestnuts." One morning, as Mr. Belden was sauntering along, engaged in his usual pastime and taking in the peculiarities of the people, he was accosted by a gentleman with the remark, "Judge Belden, I believe?" "Yes, Mr.——" replied the one addressed, "Mr.—Mr.—but I have really forgotten your name though your face is quite familiar." "Then you remember my face?" asked the gentleman. "Oh, quite perfectly," responded Mr. Belden. "Well, that is quite remarkable," said the other, "since you never saw me before." "Well, how the—— did you know me then? asked Belden. "Mr. Matthews," replied his new acquaintance, "wanted me to meet you; he described you and said that when found, you would be eating roasted chestnuts; so I had no difficulty in recognizing you." The explanation was quite sufficient and a long conversation ensued, in which the stranger forgot the chestnut-eater in his admiration for the vast attainments and wonderful conversational powers of "the large man in grey."

On the 10th of February the party left Rome, travelling northward to Civita Vecchia, Leghorn and Pisa, and thence to Florence. This city with its many objects of interest, its art treasures and its beautiful surroundings, detained the travellers six days. Among the pleasant features of the stay was a visit, by special invitation, to Dr. Alemeny's convent where are preserved a large number of Fra Angelico's paintings, various rare illuminated missals, the robes of St. Antonio, Bishop of Florence, and many mementoes of Savonarola. The concluding events of the visit were a trip to Fiesole and another to Powers studio where the sculptor was found working upon the Indian figure representing his now well-known piece of statuary entitled, "The Last of the Tribes."

Feb. 20th, 1869.—We left Florence to-day for Venice by way of the Bologna Road from Pistoja, over a mountainous country—a succession of tunnels. The day was rainy. We passed through many beautiful valleys, and reached Venice about nine o'clock in the evening, and were rowed in a gondola to Hotel Victoria. Were kept awake all night by the uproar on the streets. I got up at three o'clock and walked around until morning. The weather was damp and cool. We lived while in Florence at a *pension* on the Via Garibaldi, a house kept by an English lady, and were very much pleased with everything about it.

Feb. 21st.—Went to church at St. Mark's and then went about town for awhile. In the afternoon sailed on the Grand Canal and under the Rialto. Had our room changed to one over the canal.

Feb. 22nd.—Washington's birthday. Visited the Doge's Palace and went over the Bridge of Sighs to the prisons. Rowed on the Grand Canal; visited many churches and went around generally.

Feb. 23rd.—Took a gondola and went to Lido Murano Arsenal, Armenian College, and about the city generally. Found the Lagoon very rough. Night clear but cold.

Feb. 24th.—Visited the Rialto, Academy of Fine Arts, one or two churches, and rowed about the city for several hours. At night, took a gondola and rowed on the Grand Canal. At Rialto, met two gondolas filled with Americans, singing "John Brown." Kept with them for an hour or more. Beautiful moonlight, but cool.

Feb. 25th.—This morning left Venice for Milan, reaching it about 5.30 p.m. Went at night to look at the Cathedral. It was a fine moonlight, and the effect was exquisite.

Feb. 26th.—Went on the roof of the Cathedral and through the underground chapel. Saw body of St. Carlo Borromeo in a crystal shrine with much silver about it.

An adventure is connected with his visit to the Shrine of St. Charles which is not in the journal. He was wandering around the streets in the early morning as was his custom, when he saw quite a concourse of people, mostly women, dressed in black, descending by an entrance under the Cathedral. Desiring to ascertain the object of their visit, he followed them down the stairway, and found himself at the entrance of a large, vaulted apartment, at the further end of which was the tomb of a saint. Over this had been erected an altar at which a priest was saying Mass. The chapel was very dark, and all he could discern was the flickering candles in the distance. Desiring to obtain a better view, he strode forwards. He had taken but a few steps when he stumbled over some of these women, who were kneeling at their devotions, and whose raiment rendered them invisible in the gloom. They were upset, as was also Mr. Belden, who in falling knocked over more women, and they in turn prostrated still more. He then perceived that the room was filled with people who instantly became almost frantic with excitement, not knowing the cause of the tumult occasioned by the mishap. The utmost confusion prevailed, and immediate investigation was had. Mr. Belden, with his usual presence of mind, raised himself to his knees and assumed an attitude of devotion worthy a saint, and when the officers in the course of their inspection passed the devout man in grey, he was the last one they could suspect of creating a disturbance in church.

Feb. 26th.—Went this afternoon to see Leonardo da Vinci's "Last Supper," and was not very greatly impressed. The picture is badly damaged. The Cathedral is very fine and there is a very handsome arcade near it.

March 1st.—To-day we left Milan for Turin and Susa at 10.30 a.m., and reached Turin at 3.30 p.m. and Susa at 7 p.m. Were in sight of the snow-covered Alps all day. The country through which we passed was very beautiful. Reached Susa in the wildest snow-storm. Wanted to go to Mount Cenis, and I found a Frenchman who volunteered to interpret for me, and who made the arrangements for fifty francs—a swindle I suspect, but so we go.

(The "Frenchman" here alluded to proved to be a Russian prince, and a very pleasant and entertaining gentleman.)

March 2nd.—This morning raining and snowing. Took carriage and went to Mount Cenis Tunnel. Leaving Susa at 8 a.m. we reached the tunnel at 12 m. Were allowed to go through the shops and see all the working of the machinery, but were not permitted to go far into the tunnel. Snow about two feet deep. The route is very wild and rough, and I don't think the trip paid. Came back after satisfying myself that it would be decidedly difficult, if not dangerous, to attempt to cross the mountains. Resolved to return to Turin and go to Genoa the next day.

March 3rd.—This morning bright and clear. Saw the *diligence* start to cross to Mount Cenis and was assured by the railroad men that it would not get through. Took cars for Genoa and reached there about 7 p.m., taking boat the same night for Nice. The steamer started out and went on for about an hour and then put back on account of the high winds. Stayed in the harbor all night.

March 4th.—Left Genoa at half-past six this morning and reached Nice at 4 p.m. to-day. Stopped at Hotel des Anglais, where I found Taylor and his wife, and spent the evening with them.

March 5th.—To-day at 3 p.m. left for Paris. At 9 p.m. reached Marseilles. Changed cars and travelled all night very comfortably. Weather very pleasant, and views along the Mediterranean very fine.

March 6th.—All day on the road. Reached Paris about 6 p.m. and went to Hotel d'Albion.

March 18th.—Visited the Jardin des Plantes; wonderful collection of objects, especially of birds, with the bones of many extinct species. The only day since my return to Paris that it has not stormed.

March 19th.—Went to Mineralogical Museum. Many fossils and largest collection of minerals I have ever seen.

March 20th.—Went to Church of Notre Dame and to the Morgue.

March 21st.—Roamed about town. Went to markets and other places. Conservatoire des Arts et Metiers. Immense collection.

March 22nd.—Visited the Panorama of the Battle of Solferino; a most wonderful perspective. I think it produces a greater effect than any picture I have ever seen.

March 23rd.—Hotel Cluny, Pantheon, Sorbonne and other places. Much that was interesting and antique at the Hotel Cluny. Saw tomb of Richelieu and those of Voltaire and Rousseau.

March 24th.—At Versailles. About six miles of pictures, mostly battle scenes in the career of Napoleon 1st. Was much interested. Grounds around the Palace fine and extensive.

March 25th.—Went to the abattoirs at La Villette. Saw much butchering as well as brutality. Witnessed mode of inflating carcasses before skinning them. Produces a great improvement in the appearance of the flesh.

March 26th.—Went to the Halles Centrales; then to see several shows which were very absurd. Tried to eat some snails and not very good snails either.

Americans who visit Paris are often unable to make their way about successfully by reason of their ignorance of the language spoken. Mr. Belden, however, experienced no such difficulty. He would wander off alone and plunge into alleys and by-ways and would come back filled with accurate information in regard to what he had seen. This is the more wonderful from the fact that he was eminently deficient in what phrenologists would term the sense of "locality"—not being able to discriminate between the streets of large cities. When questioned as to how he was able to make progress in Paris without a knowledge of the language, he would reply that he knew French perfectly; that the tongue consisted wholly of physical contortions and that any man at all supple in his joints could carry on a conversation with any intelligent Frenchman. Apropos of this, he once remarked: "Mothers when they see their infants writhing in their sleep, imagine that they are afflicted either with worms or the colic. This is a mistake. The child is only dreaming in French."

March 27th.—Started for London, intending to go by Boulogne, but was too late and went via Calais and Dover. It rained and blew a gale. Sea very rough and many were sick. We finally got across though with much tribulation, and reached London about 5 p.m.

March 30th.—Went to Guildhall, Newgate, Temple Bar and many other places.

March 31st.—Went to British Museum and Royal College of Surgeons. First very fine and interesting; second not particularly so.

April 1st.—Visited the Tower, St Paul's and the Bank of England in the morning. In the evening went to Westminster Hall to see members of Parliament. Saw Gladstone, D'Israeli and others.

April 2nd.—Wandered around London. Went to Madame Tussaud's wax-works, which were very good. Went in afternoon to Zoological Gardens with Matthews.

April 3rd.—Took train at 7 a.m. for Holyhead and Dublin. Crossed Menai suspension bridge. Channel very rough and weather very cold. Reached Kingstown at 7 p.m., and Dublin an hour later. Went to Gresham House.

April 4th.—Walked about the city. Not very much to see. Took a jaunting-car and rode about for several hours. Visited Phœnix Park, which was rather fine. Saw several hundred deer in the grounds.

April 5th.—Went around Dublin generally. Saw St. Patrick's Church and went up Nelson's Monument. Prince Arthur arrived to-day. Many people in the street. They look poor; there is much destitution. In the afternoon went to Four Courts. Heard part of a trial for seduction; stayed some time.

April 8th.—At one o'clock to-day took tender for *City of Antwerp*. Much interested in conduct of steerage passengers. About four o'clock went on board.

After a somewhat stormy and disagreeable, but otherwise uneventful passage, Mr. and Mrs. Belden arrived on the twentieth of April in New York harbor. This lady's notes read as follows:—

The next day we went to Washington. Unfortunately, Congress and Supreme Court had adjourned, though many Senators, Congressmen and politicians still remained. Although David did not accomplish all he intended, he nevertheless enjoyed his visit here. Mr. S.——, afterwards our Senator, very kindly took us in charge and showed us the many sights of the Capital.

From the latter city the two proceeded to Philadelphia and then returned to New York. After a second visit of a week or more to Portsmouth, N.H., and a brief stay in Newtown, Conn., they concluded to return home. The Pacific Railroad had just been completed, and Mr. Belden was a member of the first party which made the trip to the Coast by the new route.

CHAPTER IV.

UPON returning to California, he proceeded directly to Nevada City, where he tried a few cases and, the month following, delivered the 4th of July oration. In August or September of the same year he went to San Francisco for the purpose of deciding upon its merits as a place of residence, but though receiving at the time very liberal and flattering inducements to remain, he was not pleased with its location or its climate, and hence decided to look elsewhere. In accordance with this intention he visited San Louis, Santa Barbara, Los Angelos and other points in the southern portion of the State. Returning soon after to San Jose, he took up his residence in that place and resumed at once the practice of his profession, being well satisfied that it possessed superior attractions for a permanent home. The merits of this city and its surroundings were to him, an ardent lover of nature, sources of unceasing pleasure and satisfaction. He was here enabled to gratify in a measure his taste for horticulture and allied pursuits, of which he was very fond. The results of observations made during his leisure moments he embodied in an article for the *Overland Monthly*, reproduced elsewhere, than which no more graphic and interesting account of the Santa Clara Valley has ever been written.

In 1871, a vacancy having occurred in the Supreme Court, the place was tendered to him, but as there was already a resident of San Jose upon the Supreme Bench, Judge Belden, with his usual magnanimity, declined the position, fearing that his acceptance would place the Governor, who was his personal friend, in an embarrassing position. Soon afterwards the Legislature created the 20th Judicial District, and he was appointed Judge of the same. This District comprised the Counties of Santa Clara, Santa Cruz, Monterey and later, by a division of the latter, San Benito. By reason of important litigation, this District was second to none in the State. Judge Belden's administration of the law was so satisfactory that, upon the expiration of his term, he had the endorsement of all parties and was unanimously re-elected in 1880. One of the pleasant features of his last term was the testimonial given him at its close by the members of the Santa Cruz Bar. On the last day of the session, just before the adjournment of the Court, Judge Craig arose and said:—

> If Your Honor please, with the October term of this the Twentieth Judicial District Court, in and for this county, will end your Honor's judicial term among us. The officers of this Court and the members of the bar have requested me on this occasion to deliver a short address on behalf of the members of the bar and those with whom you have judicially and officially associated for the last six years. The change in the organic law of the State, the formation of a new Constitution, has changed your territorial jurisdiction, not by the voice or the choice of the people, for it is very evident from the expression of the bar and the people that it would be their choice that they should not change the judiciary of this county nor reduce your territorial jurisdiction. Upon the contrary, I feel that I speak the sentiment of the members of this bar and of this entire

community when I say that could they by any act of theirs—by any power delegated to them in their organization of the government, they would extend your judicial power rather than diminish it. They have, as a token of regard for you, seen proper to furnish you, through the members of this bar, a token of their regard—a memento that you may carry with you, that you may keep in fond remembrance of the members of this bar and the officers of this Court. Your association with them and theirs with you has certainly been a pleasant one for the last six years. Many complicated questions have been discussed, many heated and angry debates have occurred at the bar between the counselors of this bar. You have sat patiently during the entire term; you have heard their discussions and their arguments; you have been the arbiter between them and determined all questions of controversy that have arisen between the members of this bar, evidently, sir, to their entire satisfaction; for there could not be a word to-day heard uttered by one of them against your manner of dispensing justice for the last six years. The members of this bar regret, sir, your loss; they regret that your territorial jurisdiction has been restricted and diminished. They have prepared as their token, a silver goblet, a silver cup, not presented to you for its intrinsic value, but simply, sir, as a token, as a memento that you may keep in fond remembrance of the appreciation of the members of this bar. It has engraven upon it the Goddess of Justice, blind-folded, with the scales of Justice in extended hands administering justice, admonishing you, as they appreciate your services in the past, weighing out justice to the people irrespective of their social or other standing. Upon the reverse is inscribed "Presented by the members of the bar and the officers of this Court to the Hon. David Belden, Judge of the 20th Judicial Court in and for the County of Santa Cruz." Allow me, if Your Honor please, to present you this memento to preserve, remembering the spirit in which it is extended.

When Judge Craig concluded, the audience applauded, and he opened a large morocco case, lined with blue satin, took therefrom a silver goblet, and handed it to Judge Belden. It bears the following inscription:—

PRESENTED TO
DAVID BELDEN
Judge of the 20th Judicial District Court
BY THE
Members of the Bar and Officers of the Court of Santa Cruz County, Cal.
OCTOBER, 1879

Upon the obverse is a representation of the Goddess of Justice, blind-folded holding in her hand the typical scales.

As soon as Judge Belden recovered from his surprise, he acknowledged th compliment as follows:—

Judge Craig, gentlemen of the Bar, and citizens of Santa Cruz: I need hardly say tha these kind and complimentary remarks, this elegant testimonial, have entirely surprised and overwhelmed me. No one less than myself could have anticipated this reception, and I find n expression, no language at my command, adequate to express my feelings of gratitude towards th members of this bar, the officers of this Court and the citizens of Santa Cruz, not only for thi exhibition of kindness, but for their uniformly courteous and generous treatment of myself While I feel that the eloquent language of your spokesman pays me a compliment far beyond m deserts, it is none the less grateful, even though it so far transcend my merits. It has been to m a painful reflection, that with the close of this term my official relations with this people ceas that those duties which have involved so many questions of importance, difficulty and respons bility are soon to be transferred to another, and that hereafter my coming among you will be th of a guest or a visitor, and not as a public official. It is these changing conditions, however, th help to make up the burden of life. Changes and mutations, however regretted, will come, an we have but to meet and bear them. And so I part with my brethren of this bar and with thi people, bidding them a sorrowful adieu, and bearing with me the kindest recollections of the uniform kindness and courtesy to myself.

Your speaker has been pleased to call attention to the difficult questions that come before a Judge. No one is more conscious of these difficulties, no one more painfully so of his own deficiencies than myself. There is not for the Judge, there can be for no human being, however exalted his position, any immunity from the frailties and imperfections of human nature. Judges are but fallible men, charged with the duties that seem to demand absolute infallibility. None but those who have occupied such a position, have struggled with its duties and responsibilities, can appreciate the grave, the vexatious, the harrassing difficulties that meet the judicial officer at every stage of his career. Every consideration and every form of question and controversy in which are involved interest, and human feeling and passion are concerned, from those of the gravest importance, involving life itself, to those of the most trifling character, are submitted to his decision—he has to decide them. In every controversy he has to determine for one and against the other, and he cannot expect, he can hardly hope, that those who find themselves unsuccessful in the Courts should not feel aggrieved by such decisions. To these important and delicate duties there is no limit. His duty compels him to enter regions where naught but the voice of affection, of love, of recognized duty should be heard, to decide between husband and wife, to separate children from parents, and to adjudge and compel where his actions wring the very heart-strings of litigants. His judicial duties must often compel action apparently harsh and ruthless, frequently ungracious, and as painful to himself as it is distressing to those upon whom it acts. His decisions as to property must take away from one and award to another. This to the party losing may well seem unjust and oppressive. In the range of his duties, he deals with human life, the most solemn of the many responsibilities which society imposes upon the Courts, and often compelling the Judge to act against his own pitying sympathies, or against the sympathies or resentments of an excited community. If, however, he arm himself with the consciousness that he is to the best of his ability doing that which he deems just; if he has taken to himself but one mentor, accounts to but one tribunal; if there is but one censor to whom he holds himself amenable, and that his sense of duty to determine to the best of his ability for the right, and for that only, as he may comprehend it, he may go on assuredly and fearlessly, though the world be arrayed against him.

Permit me, gentlemen of the bar, in repeating my thanks for your uniform kindness and courtesy to myself, to recognize the fact that upon my own part there may have been much of inadvertence, many a hasty or inconsiderate act or expression, borne of weariness, of anxiety, of the harrassing duties of my profession. These, regretted as soon as uttered, I here recall, trusting they may be forgiven and forgotten by yourselves, as they are regretted by me. In concluding, permit me to bespeak for my successor that kindness and courtesy which has always been shown to me. I have known the gentleman who is soon to succeed me, long and well, and I am assured that in the discharge of the high and important duties imposed by his position, he will prove himself fully as worthy your generous commendation as is he who now addresses you. The elegant testimonial here presented by the members of this bar and the officers of this Court, is a gift that will be prized by me infinitely beyond any consideration of cost or of beauty. It will be to me a constant remembrance of prized associates and cherished associations. I shall retain it as a priceless treasure while I live, and with those who shall come after me it will ever remain the prized memento of your kindness to myself, and of my own heartfelt gratitude to you. (Great applause.)

He was equally popular in the other counties of his circuit, where now his memory is revered not only for his fine intellectual gifts, but for his genial qualities and that kindness and tenderness of heart that went hand in hand with his clear sense of justice. An extract from a letter received from a Sister of Charity since his death may serve to illustrate this trait of his complex character. She writes: "I well remember I had written to the Judge, asking a favor for one who had been convicted in his court, and apologising at the same time for the many calls made upon him and promising that this would be the last appeal. He speedily replied, expressing his astonishment that I should hesitate to call upon him and thus deprive him of the pleasure of performing acts of charity.

'By the vocation you have embraced,' he said, 'you have given youself up to relieve the unfortunate; then why not allow me opportunity of sharing in your noble works by once or twice doing something like the favor you solicit? Never hesitate to call upon me when you need assistance. I will be only too happy to lend a helping hand.' This he did in very truth and in this case furnished the mother of the condemned man all the necessary assistance for obtaining a commutation of the sentence from the Governor, and, as I accidentally learned afterwards, paid all her travelling expenses, besides finding her a home, while she remained in San Jose. And this is but one instance of the many I learned of in my work among the unfortunate."

During his second term, the State of California adopted a new Constitution, by which the judicial system was re-organized, Superior Courts being substituted for the District and County Courts. It was Judge Belden's intention, at the close of his term as District Judge, to retire for a time, at least, from public life. He had in mind several plans which were to occupy his time. Among them was a second visit to Europe, as well as some literary work which he had long had in anticipation. But Fate and and his friends forbade, and, yielding to the solicitations of the latter, he again became a successful candidate for the Superior Judgeship in 1880, and, at the expiration of his term, was re-elected in 1884. The general satisfaction evinced by his retention in office was thus commented upon by *The San Jose Mercury*:—

> It is a high compliment to Judge Belden, and by no means discreditable to his able contemporary, that he, Belden, should lead the Blaine electoral ticket in this county in the manner he has, his majority reaching the splendid figure of 1,134. This shows not only the high personal and political esteem in which Judge Belden is held by the other political parties, but is significant of their appreciation of him as a judge. The people may be congratulated upon their retention upon the Bench of the Superior Court for another term, and by such decisive majorities, of two men of such judicial eminence and worth as Belden and Spencer. It speaks well for Democrats when they can thus, against their own political leanings, come over to the help of Republicans in so good a cause.

Notwithstanding the arduous duties of his profession and the frequent demands upon his time, he was still able to accomplish a considerable amount of literary work.

He was a frequent contributor to the newspapers as well as to various other publications.

We are enabled to here reproduce a series of articles, mostly of an editorial character, contributed to *The San Jose Mercury*, *The Daily Times*, and other newspapers. While one or two of these were perhaps prepared for the occasion, nearly all were of an extemporaneous character and were usually written by request and upon the spur of the moment—sometimes in the court room, often in the editorial sanctum, but seldom if ever under conditions favorable to careful and finished composition.

ADMISSION DAY.

Upon the 9th day of September, thirty-six years ago, California took her place as a sovereign State of this Union. Exceptional in climate, soil and production, in the circumstances that brought her within the domain of the Great Republic, and in her unexampled youth, she was none the less so in the inception of her political existence. With the sudden influx of a heterogeneous and turbulent population, the necessity for a political organization, by which law could be administered and life and property secured, became apparent and pressing, and the Congress of the United States was urged to take such action as should permit the organization of a State. The slavery question, with a persistence of which the present generation can know nothing, then obtruded itself into every Federal question, and the admission of a State likely to be free, met with the most vigorous opposition from the representatives of the slave-holding States. The enabling Acts requisite to California's admission had been twice defeated, and with no prospect for present relief, the situation of the country had become intolerable, and would brook no further delay. By a spontaneous movement upon the part of the Federal authorities upon this coast, a convention was elected and assembled at the City of Monterey, upon the 1st day of September, 1849. It assumed that it was clothed with all requisite powers, and that it spoke with the authority of a sovereign people. It submitted to the electors a Constitution which provided a system of government complete in all its parts, and fully adequate to the wants of a civilized community. This Constitution was ratified by the people Nov. 13th, 1849. Elections were duly held, and two United States Senators, selected in accordance with its provisions, presented themselves at Washington and demanded recognition for the newly created State. The opposition which had met former efforts for State organization, was but intensified by this action on the part of the people. The Constitution with which California presented herself, provided :—

"Neither slavery nor involuntary servitude, unless for the punishment of crime, shall ever be tolerated in this State."

In this the State defined her position upon the question which was then disturbing, and was soon to distract the nation—sectional jealousies, party antagonisms, were all aroused. Precedent and principal were alike involved against this self-asserted position. Tennessee had, fifty years before, presented herself unbidden at the doors of Congress, to be told to await the summons of the Sovereign. Within the right thus asserted lurked the germ of "Popular Sovereignty," four years later to attain such prominence, when Kansas and Nebraska, like flaming firebrands, were cast into the "Halls of Congress." Against all this the most bitter opposition, through compromise and concession, California's application at last prevailed, and like another "Minerva" from the head of Jove, with all the self-endowed insignia of sovereignty, she took her seat in the councils of the nation. The welcome which heralded her recognition was worthy the new-born state. With booming cannon and clanging bells, with beacons blazing from the Sierras to the sea, the day was made one of universal jubilee, still borne in proud remembrance by the pioneers of that day, still held in commemoration by those who come after them.

This, in brief, is the history of California's Admission Day. A retrospective glance, a few words of contrast and we close. Thirty-six years ago and the Argonauts upon this coast were fed from the wheat fields of Chili, and from the products of the East. To-day, and the surplus of our harvest is the reliance of millions, and fixes the market of the world. Then, all her broad valleys and vast areas seemed destined as the perpetual ranges of wild cattle, and the camping places of the half-civilized herdsmen. To-day, and cities that vie in splendor with any upon the continent are springing into existence through the length and breadth of the State, and happy homes, with fruitful fields and teeming vineyards, are upon every hand. Then man, with every energy which he could command, or that science could bestow, was opening vast chasms in the mountains, and sweeping whole ranges of hills into the sea. To-day, orchards smile upon these scenes of former devastation, and fruitful vines are hiding the scars of this former destruction. Then, and of the hosts that poured upon these shores, all had their homes and their hopes elsewhere – to stay here but the few years or months in which propitious fortune should enable them to go elsewhere. To-day, and this is the cherished home of all within its borders, and the hoped for goal of millions. If the country has changed—and for the better—so has its people. The bold and fearless energy that chained the rivers and loosened the mountains is to-day in a better and broader field, removing the obstacles to improvement and binding the forces of nature to the car of progress. The reckless prodigality of the Argonaut is to-day a generous hospitality, at once the wonder and admiration of all that gather within her borders. Her resources are no longer found in the fragments of melting mountains, and the debris of ruined valleys ; they are in the harvests of her fields—the wealth of her orchards—the products of her vine—those products which grow and strengthen as they are drawn upon. If the tide of immigration no longer pours upon us as in former days, why should we complain ? The gathering host of to-day are "to the manner born." This is the land of their birth, their hopes, their aspirations, and they acknowledge no other—no divided allegiance. The "Native Sons of the Golden West!" Well may the "Sunset State" trust her destinies to these, the children she has brought forth and nurtured. Well may the California of to-day, as she recalls the past and contrasts the present, look forward with hopeful exultation to the future. Skies brighter than those of Italy are over her, the climate and the products of every zone are within her borders, the sea at her feet washes the shores of Cathay and the East, the commerce of two continents meets at her ocean gateway. Among the latest born of the daughters of the Republic, and yet in the first flush of her youth, she stands to-day among the foremost in the march of Empire. The promise of her pioneer sponsors is more than fulfilled. It was no portionless maiden that waited at the doors of Congress, but a QUEEN in her own proud right, with more than a royal dowry, that thirty-six years ago demanded and obtained admission to the sisterhood of the Republic.

THE NEW STAR.

The spectacle now presented by our northern skies, and which is attracting the attention not only of astronomers and the scientific, but of the world as well, is worthy the absorbing interest it commands. In all probability, no human eye has ever beheld that which is now vouchsafed to this generation--the actual creation from cosmic matter, not of a star alone, though a sun in all its majestic splendor, but of a system, certainly equal to our own solar system; perhaps equal to the whole of the vast galaxy that each night greets us.

Other phenomena, vast, startling and instructive, have repeatedly presented themselves in our heavens. More than once has a star of apparently the lesser magnitude, blazed forth with a sudden and wonderous splendor, and as rapidly disappeared, while the baleful light that heralded its change, told to the awe-stricken observer that it was a distant sun, the center of a vast congeries of world, that was consuming in its own awful fires, and that a retinue of attendant planets, upon which mortal eye had never looked, were melting in the fervent heat. Again and before the eye of the instructed observer, would move a star that waxing, then waning, with majestic slowness, declared an orbit so vast that the centuries were but the hours on its dial, and of whose progress it was decreed that the generation which once looked upon it should behold it no more forever.

These were the histories that the midnight watcher of the skies read in those distant orbs, whose pathways were in illimitable space. But it was the story of the stars that chorused in the dawn of creation, and of worlds of which the imagination could not conceive when they were not. Unlike all this is the revelation now gleaming in letters of fire in the girdle of Andromeda.

To fully appreciate this event, a brief retrospect of what has been taught, and of what is now believed, may be instructive.

Until the fifteenth century it was universally taught that the earth was the center of the universe, and in the existence and movements of the heavenly bodies astronomy—then little more than astrology—beheld only the signs and the portents that presaged the destinies of empires, and the fates of kings.

With the "Copernican" system all this was changed, and with the invention of the telescope the immensity of the universe and the comparative insignificance of our planet began to be understood. Both before and after this era, cloud-like masses had attracted the attention of observers, and much crude and baseless speculation had been bestowed upon them. Observed through the telescope many of these were found to be groups of stars, their immense distance exhibiting them as mere dust, and to the unaided eye but a vapor.

The fact that any of these were thus resolved, confirmed the belief that with increased powers all would be thus found, an opinion that for centuries prevailed in the scientific world. From many causes, however, this theory began to be shaken. It was noted that in many respects some of these masses did not conform to the laws which were observed as to others found to be stars. That their shapes underwent changes, and that alterations in color were observed; conditions inconsistent with the theory that these were indeed systems of establishing suns. With this the state of astronomical science the great French astronomer, La Place, advanced a theory as to these formations known as the "Nebular Hypothesis." According to this theory, the origin of our own sun and its attendant train of planets was a vast mass of cosmic matter, a flaming mist, in which all existing elements were incandescent vapors, filling the vast space from the central point now occupied by the sun to the orbit of Neptune, or beyond. That, by a law inherent in matter, this mass had a movement of rotation, and was also evolving heat with prodigious energy. That by the operation of these laws the inner mass receded or shrank from the outer crust until that was left to form by the operation of the same laws upon the extreme limits of this vaporous cloud, the outer sphere of our system. That this movement of recession and throwing off continued until, in their order, all the planets of our system and their attendant satellites were in being.

This it was claimed by La Place, was the origin of our solar system, and this it was argued, was the law which had called into its present form the galactic universe. And in the nebulous masses, it was insisted, was the cosmic matter from which, by continuing development, was to be formed the systems of the future. This theory, no less majestic in its simplicity than in its immensity, at once fixed the attention and challenged the admiration, even of those who did not accept its conclusions. Supported and assailed by the most vigorous intellects of the age, it was found that, though but a theory, and as such dependent upon mere speculation for its support, it conformed to every available test, and agreed with every ascertained condition, until at last came the spectroscope, enabling the astronomer to analyze the rays of the most distant star as he could the fumes of his crucible. Applying this marvellous instrument to the nebulæ, it was demonstrated that they were masses of hydrogen gas in the highest state of incandescence, and wholly unlike any observed star.

With this discovery the discussion as to the nature of these clouds ceased, and while it was admitted that the theory of La Place could not be farther demonstrated, that it could not advance beyond a hypothesis, it was conceded that it was so established that it could neither be overthrown, or shaken by less than ocular demonstration of a nebula changing into something beside a sun, or a system of suns, or of a system coming into being without the intervention of a nebulæ.

For such a revelation no one hoped. Since the days when the skies were watched by Chaldean Magi or Egyptian astrologers, these cloudlets had remained with scarce a change, and measureless ages might yet pass, before the season of their full fruition.

The observer of to-day could but add his observations to the unchanging records of the centuries, and envy the watcher of that distant future to whom this secret of the skies should be revealed. To-day, and with this new-born star, it seems that all these questions are solved—all these doubts dispelled.

In the very centre of the best known and most closely observed of the nebulæ—in the belt of Andromeda—a star has appeared, gleaming with a radiance all its own, and moving with a velocity unparalleled, even in the swift orbits of the skies. It is to this, all eyes are now turned. Here all interest centres; and well it may. If it be indeed this fiery mist that has thus condensed into a blazing sun, we to-day are looking upon the most stupendous, the most wonderous of the marvels of Creation. We may yet see verified the theory of La Place, and behold in majestic sequence a lordly retinue of attendant worlds follow upon this primal creation,—while the astronomer of the future will trace the record of the misty cloud that for thousands of years mocked the questionings of the learned, to at last blaze upon this favored generation in a galaxy of worlds.

THE DEAD HERO.

For many months it has been known that General Grant's health was rapidly failing, and the nation has looked on in sympathizing but unavailing sorrow, while her hero stood face to face in his last dread struggle with the conqueror Death.

The struggle is over. At eight minutes past eight o'clock A.M. (New York time) yesterday, his sufferings ended, and the spirit of the warrior passed peacefully away. Henceforth the name and fame of Ulysses S. Grant pass into history, and the journalism of the day can but consider it in its more striking and suggestive features.

There has probably not been in all the annals of successful achievement an instance in which so much appears as the result of fortunate opportunity as in the career of General Grant. Born on the 27th of April, 1822, he was a little over sixty-three years old at his death. His appointment to West Point is described as an accidental circumstance, and his career as a cadet gave no promise of special eminence in the future. He took part in the Mexican War, but does not appear to have there attained any special distinction; certainly not such as was bestowed upon very many whose subsequent careers were utterly eclipsed by his own. In the military life which followed upon the close of the Mexican War, and in the civil occupations in which he thereafter engaged, there was nothing which gave any indication of ability, and but for the breaking out of the civil war the name of Ulysses S. Grant would have hardly been known or remembered outside of the immediate family of which he was a member With the Civil War came his great opportunity.

Commissioned as Colonel, and soon after promoted to a Brigadier Generalship, the first achievement which brought him conspicuously before the nation was the capture of Fort Donelson in February, 1862. In the following April he was surprised at Pittsburg Landing by General Albert Sidney Johnson. Whether the issue of that famous battle was changed by the death of Gen. Johnson, or the opportune arrival of Gen. Buel, may never be known. One thing is certain, that what promised to be a serious disaster to the Federal forces was turned into a victory, and Gen. Grant was exalted still higher in the public estimation. In April, 1863, he invested Vicksburg, and with such tenacity did he maintain the siege, and so skillfully did he repel the desperate efforts of the Confederates to relieve the beleaguered city, that upon the 4th of July, 1863, Gen. Pemberton surrendered to the Federal forces an army of 30,000 men, with a vast amount of arms and war material.

This achievement was justly regarded as the greatest success yet attained by the Union arms, and being simultaneous with the victory of Gettysburg, these great events were universally regarded as decisive of the war; the Federals were elated, and the Confederates correspondingly depressed thereby.

Immediately after the capture of Vicksburg, Gen. Grant was placed in command of all the armies of the West, and by a series of successful movements wholly overthrew the Confederate power in the battles of the Mississippi.

In March, 1864, he was, by special Act of Congress, made Lieutenant-General, and was also appointed Commander of all the armies of the United States. He at once assumed the direction of the campaign in Virginia, while his Lieutenant, Gen. W. T. Sherman, remained in the West to enter upon his renowned march from "Atlanta to the Sea." The occasion was opportune for the success and fame of the new commander.

The resources of the Confederacy, both in men and means, were strained to the utmost and largely exhausted. Gen. Lee had well-nigh wrenched the strength, as well as the confidence of the principal army of the Confederacy in his raid into Pennsylvania and the slaughter at Gettysburg, while the movements of Gen. Sherman in the South made it evident that Gen. Lee must soon win a great victory, or be crushed in the folds of the two great armies that were moving to envelop him. It was in vain that he practised upon Gen. Grant the manœuvres that had disconcerted former commanders. Firm in the faith that the Confederacy was to be overthrown by defeating its armies, he fastened upon the defences of Richmond. Nor could demonstrations through the Shenandoah Valley, or upon Washington, shatter his hold or disturb his purpose.

He believed that fighting was the way to end the war, and that battles were the business of armies, and he gave and accepted a battle whenever opportunity afforded. That he was not always successful did not shake his confidence in himself or his men, and in no way disturbed his settled plans and purposes. There was many a bloody and apparently fruitless contest, and "Coal Harbor" was very near a disaster; but the attack repulsed to-day was renewed on the morrow, until the Confederate army was worn out and decimated by a persistency which nothing could disturb, and a tenacity which nothing could relax.

At last there came the grand consummation. The army of Lee surrendered, Richmond was taken, and then the inflexible chieftain proved himself the magnanimous conqueror.

With the Confederate soldiers, whose valor and devotion he could but respect, he divided his rations and bade them return to their homes to provide for their families, and forget, as far as they could, that there had been a war. It is the history of all peoples, that to the military leaders of successful wars are accorded the highest rewards. Pre-eminently is this so of republics, and Gen. Grant, no exception to this grateful recognition, was elected by an overwhelming majority to the Presidency. This position brought to him no new honors. Unskilled either in the arts of politics, or the principles of statesmanship, neither the Cabinet which he selected, the measures that were inaugurated, nor the policy pursued, received the commendation of the wiser, the more thoughtful of the land. Notwithstanding all this he was again elected. For it was an era of hero-worship, and the fierce, hot pulses of the war were not yet steadied. His second administration was no wiser than his first, and none could fail to regret that for his own fame as well as for the sake of the country the hero of the war had not been content with the laurels of the warrior.

Four years after the expiration of his second term a party, composed in part of enthusiastic admirers and in part of political intriguers, again brought his name before the Republican convention for renomination. All the traditions of the country, found in the examples of Washington, of Jefferson, of Monroe and of Jackson, were arrayed against a third incumbency, and the convention wisely adhered to these illustrious precedents. The mistakes in Grant's Presidential administration, and the effort to bring him before the people for a third term, combined to very materially impair his very high standing before the country, and when, in 1884, his name was connected with the financial failure of a firm in which he was a partner, the undeserved criticisms and censures that were visited upon him were as unmeasured as had been the fulsome adulations showered upon him in the days of his power and prosperity. The proposition then made to restore him to the position upon the army roll, which he had resigned to become President, was rejected in a manner unworthy alike the Congress of the nation, and the soldier who had so efficiently served at the head of her armies. Scarcely, however, had this last slight of wayward fortune been inflicted, when it was whispered that this insult, that was gnawing at his heart, was not all; that a deadly cancer was eating at his vitals, and that all the honors the nation might bestow would but garnish a funeral and bedeck a tomb.

With this knowledge there came a revulsion, impetuous and sweeping. Congress, with loud acclaim, and with the plaudits of all the people, restored the dying chieftain to the roll of her soldiers. Forgotten or forgiven were all the errors of the President—the nation would only remember the hero who maintained his sleepless vigil before the walls of Vicksburg; who pinioned in his mailed grasp the army of Lee, and who had alone fought, and never feared, for the integrity of the Union. This recognition came none too soon for the nation whose honor was involved in the giving—full late for the dying soldier, who could only know that he was not forgotten, ere he passed away forever. Nor was this legislative honor all. In every assemblage throughout the length and breadth of the land—from national council and sovereign State to the assembly of the humble and lowly—Gen. Grant and his situation were called into daily and kindly remembrance. For weeks the nation stood a tearful watcher by his dying bed, and it is the people that are now mourning at his ending.

Gen Grant's permanent place in history is yet to be established. The generation in which he lived is yet too much in the fierce glare of the events in which he acted to see clearly or judge dispassionately. Partisan rancor and jealousies must be at rest before enduring history can be written. When that day shall come, while we do not believe that as a soldier Gen. Grant's name will be found inscribed with those of Hannibal, of Cæsar, of Napoleon, or of Von Moltke, and while upon his record as a statesman the muse of history will drop the mantle of kindly forgetfulness, yet the name of Ulysses S. Grant will be found high on the scroll of enduring fame, beside that of Lincoln, and above those of all the other leading actors in the greatest events of the age and of the country.

AN EVIDENT CANARD.

A report from a sensational Paris paper is going the rounds to the effect that the body of the 1st Napoleon is not, and never has been, in the sarcophagus under the dome of the Hotel de Invalides. In, or out of what this report has been started it is difficult to perceive.

All the events of the wonderful career of Napoleon, from his ascension to power to the final entombment of his remains on the banks of the Seine, have been narrated by so many, and watched with such interest, that but little could transpire unobserved and unnoted. We propose to state from recollection of the narrations, as we have not the works at hand, the facts and circumstances attendant upon the death and entombment of Napoleon and the final removal of his body to France.

Napoleon arrived at St. Helena, the place of his imprisonment, upon the 16th day of October, 1815, and died of a lingering illness, cancer of the stomach, on the 5th of May, 1821. Sir Hudson Lowe, the Governor of St. Helena, informed the companions of Napoleon that any arrangements they might suggest for the interment of the body be carried out, and in pursuance of the request, made by Napoleon himself, a grave was prepared in a valley near the former residence of the Emperor.

The grave so prepared was twelve feet deep, and was lined with masonry, the bottom forming a complete vault. The body of Napoleon, embalmed by the physicians in attendance, was inclosed in three caskets, two of wood with an inner one of lead, and upon the 8th of May, in the presence of all the military and residents of the island, and with all the honors it was possible to bestow, was placed in this vault, and the whole filled in with masonry in the most substantial manner. Near the grave a sentry box was placed, and here one of the French soldiers, who had accompanied Napoleon, stood guard for twenty years.

In 1840 the Government of Louis Phillipe obtained permission from England to remove the body to France, and in that year a French fleet under the command of the Prince De Joinville, son of Louis Phillipe and admiral in the French navy, was dispatched to St. Helena.

Upon arriving at the island, they found the French sentinel maintaining his lonely guard, and the grave apparently as left twenty years before. Mass was said at the grave, and assisted by as many laborers as could conveniently work, the task of excavation was commenced at midnight, but so solid was the masonry that the coffin was not reached until noon of the following day. It was then raised to the surface and the several caskets opened in the presence of the French officers and of the inhabitants of St. Helena who had known Napoleon in his lifetime. The remains were in no way decayed and were recognized by all who had known him, and identified by others from the resemblance to the pictures and busts, with which all were familiar.

After this identification the leaden casket was closed and soldered and placed in a massive metal casket and this closed and sealed with the seals of the French officials. A "process verbal," or statement reciting all these facts, was then prepared and signed by all the prominent officials, French and English, who were present. The body was then taken upon the flag-ship of De Joinville. In the cabin of the vessel a chapel had been prepared and in this the coffin was placed. A guard of honor remained in attendance day and night, and religious exercises were conducted in the chapel each day at which the officer of the vessel attended.

In this manner the body was conveyed to France. The seals which attested the unchanged condition of the casket were here examined by the Commissioners of the Government. The body was received and, with a pomp and magnificence never excelled, if indeed it ever was equalled, the mortal remains of the Corsican adventurer, the Emperor and the exile, were laid to rest "by the banks of the Seine, amid the French people he loved so well."

For their final resting place a magnificent tomb, embellished with all that art could suggest, was constructed beneath the dome of the "Hotel des Invalides." A sarcophagus wrought from a mass of porphyry, brought from Northern Russia and weighing over sixty tons, received the casket. Upon it a slab equally massive and of the same material was laid. Again the same attestation which had attended the reception of the remains in France, was had, and upon the 2nd of April, 1861, the casket was laid in this, its present resting place. Over these remains from the day of their exhumation at St. Helena to the present time, there has not been a moment when a soldier was not standing guard. Over this tomb burns, night and day, the lamps of an altar. The place is at once a temple, a tomb, and an asylum, and a thousand soldiers, the veterans of France, have there their constant home. That thus proved, thus watched and thus guarded, this body can have been spirited away, is not to be entertained for a moment.

A STORY OF WATERMELONS.

It is in these days that the provident citizen on his way home, notices the heaps of luscious watermelons that encumber the sidewalks, and in the most indifferent manner, and as though he was seeking knowledge for next year's application, he queries of the dealer, "What are melons selling at now?" and the wary dealer, who understands the purposes of our worthy citizen as well as he does himself, in the most perfunctory manner responds, "Two bits for the biggest."

Now be it known that our dealer in melons is an old coon – and he has put at the bottom of his pile those large and ancient ones that are overripe, and has covered them with the small and fresher ones as though he would hide from his customer his larger wares. But the citizen spieth this device, and out of the bottom of the pile he selects the largest of these melons, and with a knowing look remarks that he will take this; and paying his quarter, and with a lingering look to see if there may not be yet a larger one, starts for home with a melon that weighs about forty pounds. After he has walked about a block he begins to wonder if a smaller melon would not have answered—and questions the economy of nature that makes the outside of this fruit so slick and smooth, and has not provided it with handles like molasses jugs, or market baskets—and the farther he goes the heavier and smoother and meaner his melon grows, and he begins to feel pains in his arms and cricks in his back and a feeling of goneness generally—and at last, while he is trying to find some way in which he can handle the cussed thing without absolute torture, it slips from his wearied arms and spreads in utter wreck and ruin over the sidewalk.

With such a catastrophe there is but one thing to be done. Spilled milk is as reclaimable as the melon thus deposited, and if he is a sinner, with the emphatic remark, "d—n the infernal thing"—or, if he is a church deacon, and there is anyone near, "bless my soul," which means the same thing, he goes on his way—and the street arabs that, like the wreckers on a coast, have beheld with joy this shipwreck, gather, and they scoop out what is edible of that ruin and make merry over the misfortune of the bearer, and then earnestly watch, and would earnestly pray if they but knew how, that another may speedily start to carry home a big melon. It is thus that the rinds and wrecks of melons do encumber our sidewalks.

AN EPISODE IN TURKISH HISTORY.

While the contest is raging which is to determine the continuance of the Turkish empire west of the Bosphorus, it will not be uninteresting to recall a great event which two hundred years since gave the first decided check to Moslem progress upon the continent of Europe.

After the overthrow of the Eastern empire the successors of the Caliphs had contented themselves with extending their dominion and the faith of the Prophet through Asia, and although their presence upon the western shore of the Sea of Marmora was a constant menace to Christendom, the spirit of conquest that had borne the crescent in triumph over the greater part of Asia seemed allayed. But although thus inactive, the deeds of the past, the heroic achievements of Omar and of Caled, were a perpetual incentive to new enterprises, and all that was required was a leader of sufficient ambition to give this impulse direction, and renew the invasions and the conquests of the Companions of the Prophet. In 1683 came the leader and the occasion.

Mahomet IV., a bigoted fanatic, was upon the throne, and was ruled by Kari Mustapha, his Grand Vizier, a bold and ambitious soldier. Seizing upon a trifling pretext Mahomet declared war against Austria, and in April, 1683, Mustapha, at the head of an army of four hundred thousand soldiers, began his march for Vienna.

No force that Austria could place in the field could hope to arrest the progress of this mighty host, and the few fortified places on the line of their march were scarcely obstacles to their advance as they swept up the valley of the Danube. As it approached Vienna the Emperor and his Court fled from the city, leaving the Count Stananberg with a garrison of but ten thousand men to make such defense as he could for the Austrian capital. In vain did the Austrian Emperor implore the aid of the other nations to repel this Paynim invasion.

The petty jealousies of other cabinets induced them to look with indifference if not with satisfaction upon the humiliation of the Austrian empire, and Vienna was apparently left to its fate and to all the horrors of siege and sack at the hands of the Moslem invaders. But relief came from a quarter that had often before aroused resistance to these infidel invasions. Innocent XI. was in the chair of St. Peter, and beheld with horror these Paynim hordes over-running Christian States. He dispatched his "Nuncios" to every Court of Europe to urge upon all Christian kings the duty as well as policy of making common cause against this invasion. At one Court only was his "Nuncio" successful.

Upon the throne of Poland sat John Sobieski, a statesman, a ruler and a soldier, without equal among the rulers and soldiers of Europe. The occasion admitted of no prolonged diplomacy; the character of Sobieski did not require it. With the tried veterans of many a bloody field he set out at once upon his march, while swift messengers preceded him upon either hand and summoned the warriors of the nation to his standard. For neither recruits nor supplies did he pause. "God will provide," said he; "I can make no delay"—and on he swept by forced marches. Upon every eminence blazed beacons. From cathedral altar and from wayside shrine; from prelate and from priest went blessings on his host. He paused for neither one nor the other, but pressed on.

Well had Sobieski declared that God would provide. Over the whole land rested the dread horror of the followers of Mahomet, and on the line of Sobieski's march willing hands supplied all they possessed, and all that was required for the sustenance of their defenders. With the first light of day the Polish army was in motion, and darkness came before they halted for the night.

There was urgent need for this haste. For forty-five days the Turkish hosts had invested Vienna. Eighteen times had they stormed the walls, and been each time repulsed by the heroic garrison. Women and children fought side by side with men, or spent the night in repairing the breaches made by the fearful cannonade. As the Polish king approached, the Turks redoubled their efforts. Famine and pestilence came to their aid, and even the stout-hearted commander doubted. A messenger from the Count made his way through the lines of the besiegers and met Sobieski. "The Count bids me say to the King of Poland," said the messenger, "that he must come soon or he will come too late." "Return to the Count," said Sobieski, "and say to him that day after to-morrow I will be in Vienna, or dead beneath its walls."

On the night of Sept. 11th, the Polish army reached the heights that overlooked the city, and beheld upon every hand, as far as the eye could reach, the camps of the Turkish army. Three rockets notified the beleaguered city that deliverance was at hand. All night the Moslem camp resounded with the din of preparation. All night sounded the great bell of St. Stephens, called the bell of anguish, that had tolled without intermission since the investment of the city.

At daylight a solemn mass was celebrated by the Papal Nuncio in the presence of the whole army. Sobieski himself serving at the altar. The sacrifice over the "Nuncio," in the name of the vicar of Christ, gave solemn absolution to the kneeling warriors that were that day to do battle for Christendom. Sobieski then bade his son, a youth of fifteen, approach, and conferred upon him the rank of Knight. "I am thy sponsor, my son, that thou shalt this day earn this honor," said Sobieski.

The Austrian and Polish armies had united and were under the Polish King. They numbered less than seventy thousand men; their adversaries over four hundred thousand. The disparity, if considered, did not dismay the Polish hero. "God is with us, who shall be against us," he said; and gave the signal for advance. Against the Christian army Mustapha poured his hosts like a torrent. Wave upon wave of fierce fury swept warriors of Islam. Upon evey hand they met a wall of steel and a sheet of flame.

The fanaticism of the Mussulmen was met by a faith as fearless and as unquestioning, and with its path marked by a broad swath of corpses the Christian army pressed on. Upon the walls of Vienna thronged the famished survivors of the dreadful siege, watching in breathless suspense the conflict that was to bring to them and to theirs deliverance or destruction. Above the thunder of battle the war cries of the struggling hosts tolled the solemn bell like the wail of a people. All day the contest raged. All day the Christian army pressed forward, and as night approached the Turkish army faltered. Hesitation soon turned to retreat, to flight, to hopeless route. All night fled the fugitive host. Far into the night, with lance and sword, came the pitiless pursuer. The overthrow was complete, and the last wave of Moslem invasion receded to the shores of the Bosphorus.

Upon the following day Sobieski at the head of his army made his entry into Vienna. Through the wrecks of houses shattered with shot and shell, amid the survivors of a population decimated by famine and the siege, rode the Polish deliverer. Upon every hand knelt men invoking blessings on his name. Mothers held up their infants that they might look upon their preserver. From every spire the bells rang peals of jubilee. At every altar thronged grateful worshipers, and the horrors of the siege, though but of yesterday, were half forgotten in joy over their deliverance. Through such scenes Sobieski at the head of his army proceeded to the church of St. Stephens, and in grateful homage laid his sword, wet with blood, upon the high altar; while upon the walls as votive offerings were suspended the captured Moslem standards. Such was the great deliverance that the valor and devotion of Poland wrought not for Austria alone but for all Christendom.

One hundred years later and in this rescued city sat the envoys of Austria, Russia and Prussia, agreeing upon the iniquitous partition of Poland.

Little wonder perhaps that Catharine of Russia was shameless; that Frederick was rapacious; but that Austria should thus aid in the spoilation of her benefactor surpasses the infamy of either of her confederates in this crime. Upon the walls of St. Stephens moldered the captured standards; upon the high altar rusted the sword of Sobieski.

From the lofty tower still sounded the bell that had summoned the deliverer and welcomed the conqueror. Upon every hand were the mementoes of those days of dread, of that day of deliverance, and the sword of Austria should have leaped from its scabbard in the defence of Poland.

Alas for the honor of Austria. More than all others she fostered the scheme, aided in the outrage and shared the plunder that obliterated from the nations the land of Sobieski.

THE EMBERS OF BIGOTRY.

At the recent celebration in Philadelphia of the Centennial of the adoption of the National Constitution, Cardinal Gibbons, at the urgent request of the Committee, occupied a seat on the platform and offered the closing prayer. To which appearance and action upon the part of Committee and Cardinal *The Presbyterian Journal* is moved to devote ten columns of its valuable space, concluding as follows:

"We confess our Protestant blood boils over this. Protestants who were on the Commission had no right to sell out and humiliate this Protestant city and this Protestant nation. If they were hoodwinked or acted from ecclesiastical ignorance, they should confess their error."

We have read the reports of the exercises and the descriptions of the distinguished personages who took part in them, and we do not understand that the conduct of the Cardinal on this occasion was other than that of a distinguished gentlemen. We have also read the prayer which he offered, and can only say that, in our opinion, expressions more aptly voicing the gratitude and supplications of fifty millions of people, Jew or Gentile, could have hardly been chosen. We are, therefore, forced to the conclusion that it was nothing which Cardinal Gibbons did or said that roused this fearful temperature upon the part of the *P. Journal*, but it was that a Catholic Priest should presume to stand up—or sit down—or open his mouth in the presence of this self-sufficiently sanctified humbug.

How painful, too, to the sensibilities of this "hot-blooded" *P. J.* must have appeared the insensibility of the vast audience, who, apprised weeks beforehand of the part assigned to the Cardinal, crowded the hall, and, without any apparent manifestation of horror, permitted themselves to be prayed for by this Prelate.

That upon the platform and by the side of this Priest and Prince of the Catholic Church sat the Bishop of the Episcopal Church of Pennyslvania, and the Bishops of different denominations of a dozen other States.

That upon the same platform and in the same fearful propinquity sat the President of the United States and the Governors of twenty States.

That the oration which preceded this prayer was by one of the most learned and highly revered members of the Supreme Court of the United States—in fact that the group in which Cardinal Gibbons was an individual, was composed of the highest in position, in learning and worth that this continent could marshal—and not one of all these dreamed of the outrage inflicted upon themselves or the scandal brought upon the nation until apprised of the fact by this ten-column crusher of the *P. J.*

We would like to offer some consolation to our distressed contemporary, but do not see where we can direct him. We will, however, suggest that Philadelphia in the past has been given to these soul-harrowing exhibitions upon the part of Catholics. In 1776 one Charles Carrol, a Catholic, had the audacity to sign the Declaration of Independence, and thus place in jeopardy his life, as well as the largest fortune then held in the colonies. In the very convention here celebrated sat Daniel Carroll as a representative from Maryland, a Catholic and one of the most influental members of the Convention, over which George Washington presided, without any apparent appreciation of the fact that he was greatly demeaning himself by this association with a Catholic, and still worse. Horrors on horrors heaped. Upon the death of "Washington" John Carroll, Bishop of Baltimore and Catholic Primate of the United States, at the invitation of Congress, delivered before that body the eulogism upon the "Father of his Country."

In fact, neither in the past, the present or the future, do we see any comfort for *The Presbyterian Journal* at any time. Somebody whose theological views do not exactly accord with its own, is liable to come before its horrified vision, and then its "Protestant blood will boil," etc.

Really it is difficult to speak with seriousness of this idiotic attack upon the committee and the Cardinal. We shall not do the Presbyterian denomination the injustice to assume that this bigoted ass represents anyone or anything but himself.

We read the article with astonishment and we dismiss it and its author with the contempt which Presbyterians, Catholics and all others must feel for so paltry an exhibition of the most puerile bigotry and intolerance.

CHEMISTRY OF LIFE AND DEATH:

To a reflecting mind the changes wrought by death,—the dissolution of the grave,—should have no more of horror, of repulsion, than should those equally marvelous processes by which the phenomena of life are maintained. Each in its way and for its own special purposes, is but the chemical disintegration of organic substances preparatory to their assimilation in new forms, under the same general conditions, the life functions gathering and binding in new combinations the elements released by the dissolution of decaying organisms, while those processses which come with death are but the taking apart, and distributing anew the elements of the lifeless and now useless fabric.

Beginning with the chemistry of life—with that universal instinct which from the first moment of conscious existence is collecting from every quarter the needed nutrition ; which hides within tissues and integuments the alchemy by which that process of decomposition called digestion, is carried on ; which seizes these dissolving elements, as they are passing away and, through a thousand hidden channels sends them in crimson floods to every part of the organization to be nourished by them, which, charged with duties as constant as they are varied, neither falters nor errs in its ceaseless rounds, but bears as needed, and when required to every part of the complex organization that just adapted to its special wants. No form of organic or inorganic matter escaping its requisitions—no part, from rigid bone to flexile hair, overlooked in its distribution ; but at the double command, that of the great central motor, the heart, which bids it go, and that gentler one of affinity which beckons it to come, each atom of lime, of iron, of gas or of water, speeds to the place where the waiting tissues are to take them up until the man, heedless of the charnel house he bears within him, of the complex chemistry of which he is but the passive result, stands forth, the perfect organization that we behold him.

Nor is this all. For fifty, perhaps for a hundred years, this tireless toiler with sleepless vigilance maintains this wondrous work. And this is life—life created from, and supported by decay, by disintegration, by death. Upon none of this do we look with repulsion, and, marvelous though it be, scarce with surprise.

At last there comes a change. The object, the end of all this effort is reached—the purpose of the artificer is accomplished. This framework, brought together with such skill, maintained with such watchful assiduity, has subserved the design of the Creator. The forces that have so long sustained, pause for but a moment, and the man is dead ; but the builder, the artificer of all this, is neither dead nor sleeping. In her realm there is no rest, in her work no cessation ; bringing together and bearing apart are alike her mission, and not an instant does she pause in her work. To the servants that have gathered at her command, that have builded so deftly at her bidding goes her mandate, return to the elements from which it was fashioned this useless frame. In its creation the myriad forms of all the past have paid tribute, and the boundless life of the future demands its return. Make no delay. How swiftly is she obeyed. As we gaze the water vanishes upon invisible wings. The sunbeams have caught it up, pure and stainless, as though it were the dew drop wooed from the bosom of a flower, and away in the clouds, the cataract, or the crest of the ocean wave, it speeds upon its new mission. Away fly the gasses to feed upon and to fill the fields of waiting grain, the ripening fruits, the fragrant flowers; from the short companionship of death they take their flight, and away and afar they scatter to enter into new forms of life. The pallid cheek of sickness brightens as it drinks them in ; beauty finds an added charm in their coming, and the sinews of the lion a new strength as it infolds them, and so they vanish—a few short months and nought of this structure but the bony framework remains. This, says the wondering watcher, this, at least, will resist decay—this must endure forever. Vain delusion! The alchemist that is here at work laughs at resistance. Her days are the ages, the mountains have been vapors in her laboratory, the continents but the sands of her crucible. In every direction agencies invisible but potential are at work. With solvents from a thousand sources, with affinities in endless variety, each atom is wooed and won and borne away, swallowed up in that great all-pervading ocean of life, in whose eternal cycles all forms of existence have alike their beginning and their end.

A HERO.

In the general feeling of gratulation over the release from their fearful prison of the seven Comstock miners, in the sadness all feel at the loss of the two brave men who sacrificed their lives in the effort to rescue their fellows, the heroism of Jack Vandeusen, the miner who made his way alone to the imprisoned men to tell them of the efforts being made, of the relief that awaited them, is deserving of more than passing mention. Few who read the short report of this performance will at all appreciate either the perils hazarded or the heroism that grappled with them.

One must at least have been through these tunnels and drifts, when the mines were in their holiday attire, when the mighty genii that science has invoked holds the demons of these cavernous depths in check, to even imagine the situation when scalding waters and poisonous vapors, breaking their bounds and bursting their chains, sweep and swell through these gloomy chasms.

The world never wearies of describing the fierce charge, the deadly strife of the battle field, where in the bright sunlight man struggles with man for the mastery. The Old Guard at Waterloo, the "Charge of the Six Hundred," has been again and again told in poetry and prose; but no man who fought at Waterloo, no trooper who followed Cardigan at Balaklava, either in the horrors that surrounded, the dangers that attended, or the purpose to be accomplished, can compare with the achievement of this Comstock miner.

It was over two thousand feet below the surface of the earth, and fourteen hundred feet from this depth that his journey was to be made. It was through waters breast high and scalding hot. It was through vapors, a breath of which was death. His guard an apparatus that might fail him at any instant. His pathway, a trench bestrewn with floating timbers—seething, slimy and horrid—dangers in every form about him; in a darkness that might be felt; where to stumble was to perish, to halt was to die. Through fourteen hundred feet of all this he made his lonely way. He knew the full measure of his danger, for the two who had essayed that fearful journey he knew must have perished, and the one who but passed the threshold had returned a raving madman.

Upon every hand there was death, and death in its most revolting forms. Death in the seething, scalding waters that surged about him: in the poisonous vapors that enveloped him. Death in the corpses that he well knew were floating at his feet. Death and dead men, perhaps, to greet him should he reach the prison house of his fellows. It was with all this about and before him that Vandeusen started upon this dread expedition.

No warrior upon bloodiest battlefield, no soldier leading a forlorn hope, ever met dangers so beset with horrors, or faced death with such desperate odds against himself.

The price for which all this was risked—not fortune, nor fame, nor glory—but the hope, slight to all others as a gossamer, that he might at all this risk, with all this sacrifice, restore to their families and their homes his imperiled comrades.

There are Pantheons in which the rulers of men will be ever apotheosized—there are pedestals to be crowned with the statues alike of butchers and the benefactors of men—there are poems and songs that for all time will commemorate the deeds of valor, of devotion, and of sacrifice; but when real heroism shall be honored—the true hero shall be crowned—first amongst the foremost shall be found the Comstock miner Jack Vandeusen.

FOOLING THE DOCTORS.

A statement is going the rounds of the papers to the effect that some months ago the New York *World* had a young lady pretended to be insane, examined by physicians and sent to the asylum, where she kept up this pretense for a couple of weeks, then disclosed the sham she had been practicing, and was discharged. Upon this certain journals very sapiently inquire "of what value is the opinion of physicians in such cases," and many others are exercised by the fear that they are liable to be snatched up, and, *nolens volens*, consigned to an insane asylum though there is nothing the matter with them. We can say for the information of all that if they will take the course of this new York *experimentalist* they will fool the doctors just as she did, and receive the same treatment, and that with all this there is nothing to get very much excited over. Doctors in dealing with mental, as well as physical maladies, will act upon about the same appearances, and will exercise the same common sense. If a party charged with a hideous crime suddenly blossoms out as a lunatic, they will consider the very strong motive he has to simulate insanity in order to escape punishment, and will proceed with caution. They will assume that between the gallows and the insane asylum a very powerful motive is presented for dissimulation and will estimate the symptoms presented accordingly. With the majority of cases no such motive or any motive for pretence is to be found or exists, and the doctors have no reason for presuming that a party is subjecting himself to expense, restraint, rigorous medical treatment, etc., for the mere purpose of fooling some one, and if he were there is rarely anything in the physical symptoms to indicate it. Farther than this, in almost all cases of insanity there are lucid intervals in which the party is as rational as anyone. And one of these may occur while the party is under examination. In such a case the doctors have nothing to guide them but the testimony of witnesses as to insane conduct elsewhere, and upon such evidence they must act. Besides this it often occurs that persons of unmistakably unsound minds do have sufficient self-control to at times wholly conceal their malady, and thus baffle the most thorough medical examination. This is notably the case in homicidal mania. The party laboring under this most dangerous mania, is usually exceedingly cautious and secretive in his actions and demeanor, and his madness only developes itself when opportunity brings some helpless victim within his reach. In these cases the doctor is often compelled to rely entirely upon the statement of relatives, friends and acquaintances, and if these have been imposed upon by one of these facetious impostors, the doctors, of course, will be. We regard the exploit of the New York *World* as silly and senseless, a trick that can be played at any place and upon anybody, doctor or layman, and should any idiot think it worth repeating we can give them a few of the *indicia* that will be as successful here as in New York. Let the individual who proposes this stunning joke suddenly change all his habits and conduct. Let him refuse to eat, alleging the fear of poison, or eat greedily the vilest filth. Let him run naked through the fields and over the roads, pretend to attempt to murder his family, sit on a red hot stove, cut his throat from ear to ear, or arrange to have himself found half hanged, let him kindle fires in his barns and stacks (uninsured), and generally let him do any and everything that lunatics and idiots only do, and he will have no trouble in getting sent to an asylum, and so long as he continues these vagaries he will be kept there. To be sure the more violent his misconduct the more vigorous will be his treatment. He will be kept in a straight jacket, drenched, physicked, and made generally uncomfortable, but against all this he will have the satisfaction of proving that he is fooling somebody and making a fool of himself. Nor is the field of these brilliant deceptions necessarily limited to insane pretenders. Any one can summon a doctor, and, griping, groaning and howling as though in the pangs of colic, can humbug the doctor into administering all sorts of plasters, purgatives and potions when really there is nothing the matter with the funny fellow, and we are not sure that this imposition could not, by the simulation of pains and aches, be carried to the extent of inducing a surgeon to saw off a perfectly sound leg—a feat which would doubtless be regarded as a crowning achievement by this school of humorists. Oh, no, there is no trouble in fooling the doctors if you only go at it right.

OUR SUBTERRANEAN WATERS.

That "waste makes want" is a proposition as sound to-day, as when it was first promulgated by "Poor Richard," and that the repetition of this trite maxim will change the habits or characteristics of men, is exceedingly improbable.

It is not therefore to those who are wasting, but to the many who are made to want from the wastefulness of others, that we purpose offering a few suggestions as to the shameful waste artesian wells are making in our subterranean water supply, and the very serious consequences already experienced from it.

If, in examining this question, we shall be thought to state much that all do, or ought to know, it is simply that the conclusion we have reached, may be seen to be based upon indisputable facts and premises. The valley of Santa Clara doubtless occupies the bed of an ancient lake. As in all such formations, the alluvial soil is underlaid by alternate strata of clay and of gravel, the latter surcharged with water, the clay tough and impervious to moisture.

In the hills and mountain ranges which encircle the valley, the rainfall is very much heavier than in the valley itself, and a large amount of this water finds its way into the gravel beds where they touch the hills, or are intersected by the creeks and streams of the valley. Thus supplied—flowing through the gravel deposits—and confined beneath the impervious clays, a succession of strata of water are slowly making their way beneath our soil, from their sources in the hills to their ultimate destination in the sea. From the upper of these streams, and lying above the first clay bed, the surface wells from ten to fifteen feet deep, and once so common all over the valley, were supplied. As to this there was no superimposed clay to afford pressure, and these waters do not rise above the level at which they are found. Below this clay, and at depths of from sixty to one hundred feet, is found the large supply, which, retained by the clay, rises whenever this is pierced and affords the flowing wells—once our hope and our pride, but now the plague and the curse of our valley. At still greater depths, other bodies of water have been found, but under conditions which indicate a very remote source, and it is doubtful if these deeper wells are any material detriment to the country.

It will thus be seen that our valley is an alluvial surface, underlaid by a succession of stratas of water, probably connected with each other by natural fissures sufficient to maintain permanently a sheet of water within five or ten feet of the surface, and by percolation and capilary attraction the moisture itself, rising within two or three feet of the surface. That this was the situation twenty years ago is too thoroughly established by the wells and excavations then made to be questioned. That this is now all changed and very much for the worse and by some general and permanent cause, is apparent. We have but to open our eyes, and in the thousands of flowing wells, that in an incessant stream of wastefulness, are pouring these priceless waters into the sea, we have the full explanation of this lowered water zone of our valley. Prodigal as is nature in this her bounty she has not equalled man in his capacity to waste, and, so year by year, the moisture that should have maintained in all its forms the vegetation of this valley, has sunk lower and lower, until now it is below the reach of every form of surface plant.

It was at one time supposed that the consequences of this wasteful mischief would be confined to the wells themselves, and that in their diminished flow was all the injury to be apprehended. This, it will be readily seen, is not the case, but the consequences are much more general and far-reaching, and are giving us in effect three or four dry seasons, where we need but suffer from one.

That this is the case is easily shown. The seasons of California, as of most of the world, move in cycles of about eleven years; of this period two or three years are generally very wet, usually culminating in one of floods with two or three exceptionally dry, and usually accompanied by one of extreme drought, while the other years of this cycle are about the average of the entire term. This is the observed meteorology of the coast. In the very wet seasons, the soil of the valley is thoroughly saturated. This moisture sinks away, until it reaches the point at which it is maintained by the permanent subterranean supply, which would naturally be found within four or five feet of the surface.

From this level the moisture would readily rise to meet the rainfall of moderately dry years, and thus establish that connection found indispensable to the perfection of crops. In the exceptionally dry years, when the rainfall does not exceed six inches, these moistures probably would not connect, and drought and failure must result; but with the seasons of moderate rainfall, say from twelve to twenty inches, the moisture would pass this dry belt and uniting, establish this necessary condition to plant growth.

It has, however, been established by observation and experiment that a season's rainfall of fifteen inches will not descend farther than two or three feet, and the connection must be made by the lower waters rising through the intermediate space, when within five or six feet of the surface, aided as they are by accessions from the surrounding hills, and by the laws of capilary attraction and of affinity, this they will readily do, and thus this subterranean lake in early days acted, and should always act, as a great regulator, by which the surplus of the seasons of excessive rainfall are made to bridge over those in which the supply is deficient. When, however, this supply is drawn away and exhausted, when this dry belt is increased from five to fifteen or twenty feet, the surface and lower moistures can not pass this increased belt, and do not meet, vegetation of all kinds has then only the surface rainfall of the season, and thus a season of simply deficient rainfall is changed into one of absolute drought.

This is the actual condition of the valley to-day; this was largely its situation last year, and should not the coming winter be a very wet one, this, in an aggravated degree, will be its condition next summer. Of course, in the very wet years, no detriment is experienced. It is in wasting of that which nature should teach us to store up during these seasons, that we find the want in the drier years. From every part of the valley, especially from the upper portions, we hear each year increased complaint of wells failing, streams supposed to be permanent drying up, of sycamore and forest trees dying without any apparent cause, of orchards perishing despite the most thorough cultivation, and of the utter failure of crops of pumpkins, corn and other vegetables heretofore found certain and infallible.

If those who are thus complaining will sink a shaft upon their farms, they will find the soil for a depth of ten or twelve feet as dry as a powder horn, and will no longer wonder at their crops failing. They will discover that where twenty years ago water was found everywhere at a depth of from four to six feet, now not a particle of moisture is found at a less depth than fifteen or twenty feet, and if they are curious to know what has become of this vast lake, they have only to visit Alviso, and the marshes in that vicinity, to find scores of utterly useless wells pouring, summer and winter, millions upon millions of gallons from this their depleted reservoir, into the sea. In almost every direction, wherever a well will flow, they will find it flowing in the same wasteful manner.

At some time this will be stopped. Some future generation will perhaps have intelligence enough, reasoning from cause to effect, to suspect that it is running the water out of this natural reservoir that is lowering its surface, and having made this discovery, will have the energy and good sense to enforce the law against this waste that now stands a dead letter on our statute book. Until that better day, and that wiser generation, we can but expect that those who thus permit the water—the very life-blood of our valley—to be wasted, are very likely themselves to want for bread.

MARRIAGE CONTRACTS.

Two controversies now pending in the Courts of San Francisco should call the attention of future law-makers to our marriage laws. In one, the Blythe estate, some two or three women claim to be the widow of a dead millionaire, and a disgusting squabble over the body of the defunct took place before it was vouchsafed burial.

In the other, Wm. Sharon, an ex-U.S. Senator and a many times millionaire, is asserted by a woman to be her husband, and with this assertion comes the claim—doubtless the inducement to this assertion—that the ex-Senator share his millions with this aggrieved wife. In neither of these cases was their any formal solemnization of a marriage. In the case of Blythe, these marriages are sought respectively to be proved and disproved by the establishment of relations quite as consistent with a meretricious connection as with legitimate wedlock, while in the case of Sharon, the alleged wife relies for the maintenance of her claim upon the production of a written agreement of marriage purporting to be signed by herself and Sharon.

There is no doubt that under the law as it now stands, a marriage can be legally established by either of these methods, and in view of our present experience, and of the very great probability that success in the present cases will make them the precursors to a multitude of similar exhibitions, we think it is high time to call a halt in this direction, and progress promptly and decidedly a few steps backward. It is all very well to declare, as does our Code, "that marriage is a contract." It by no means follows that it is not as a contract of such a character and attended by such consequences that special formalities of execution, proof and publicity should not accompany and attest its execution.

This is the course required now in very many instances upon considerations of public policy and security. In mortgages, conveyances of lands by married women, homesteads and wills, each and all of these must be executed and attested in a form prescribed by law and intended to prevent frauds; and certainly none of these, either in the facilities for fraud, or in far reaching results, calls more urgently for efficient safeguards than does this marriage relation.

The Catholic church, with a profound wisdom, the growth of centuries of garnered experience, has ever recognized the necessity and the importance of these precautions, and the methods which she commands may well commend themselves to those without as within her pale. In the first place the bans must be proclaimed in public congregation upon two successive Sundays before the marriage. The marriage must be solemnized by the priest of the parish in which one of the parties resides, and in which the bans have been published. There must be at least two witnesses besides the priest and the parties present, and an entry must be made at the time by the priest in the parish register, giving the names of the parties, the date of the marriage and of the witnesses present. None of these steps form any part of the religious rite, they are simply the precautions which the Church takes against fraud and imposition. Similar methods to the same end are pursued in many other religious denominations, and their wisdom, attested by the experience of ages, no one can call in question.

All this, and all which may look like a precaution, our legislation and our laws cast to the winds, and the most important of all the transactions of life is left as though it were the studied purpose of the law-maker to treat it as of the most trivial import, and to lay it open to every possible form of fraud, simulation and deception. All that an adventurer of either sex has to do is to skilfully forge a signature, or, as can almost always be done, procure a genuine one, and then write above it half a dozen lines, and affix his or her own name, and all that the law requires for a marriage contract is established. Then let the party manage to have a few interviews, to establish a few more or less equivocal acts, and a case is made which it would be no easy matter for any one to overthrow.

It may be imagined that only men in Sharon's position are liable to such attacks. This is a mistake. No one is safe from them. The man whose married life may have squared with the very highest considerations of morality and marital fidelity may not have been always thus impeccable. The temporary associate of former years, long abandoned and forgotten, may be able to prove those former relations; she may forge a writing, or a signature, or both, and with mementoes preserved for a sinister purpose, may present herself before he is cold in his grave, to claim his estate, degrade his widow and bastardize his children.

It is not the unmarried or the profligate alone that are endangered by these possibilities. Against forged papers and fabricated testimony none are secure. As a means for extortion and black-mailing, for bringing shame and disgrace upon wives and children, for destroying the peace of families and disturbing the welfare of society, the marriage contract now recognized by our Code is a perfect Pandora's box of pernicious possibilities. And for what is all this evil chanced—these perils invited? Is there any good reason in the world why this relation, which every consideration of propriety and decency requires should be made public, should be concealed—why that relation, which all concede is of the gravest public importance and interest, should be concealed from the public? Can anyone imagine a case in which parties ought to be married, and at the same time that it ought to be supposed that they are not; that it is well that in a matter of this grave import they should be suffered and even encouraged to live a lie, and practice a deceit. To this all right-minded people can make but one answer. We think it is well that these conspicuous examples have called public attention to this law and its possibilities.

We are wasting no sympathy upon any of the parties to these controversies. In our opinion neither deserves any. We believe the law should be radically changed; so changed as not only to prevent the recurrence of such cases by prescribing forms and compelling publicity, but that the legislation which provides for this in the future, should also take cognizance of the fact that forgery and fabrication may create a date as well as a signature, and that contracts may hereafter be asserted, dated as of the time when this pernicious law was in force, and thus the evil will be but palliated, not remedied.

That, to guard against this contingency, the law should make provision for, and require all such secret contracts to be recorded within a time to be specified, or in default of such record that they be held forever void. Some such legislation, searching and far-reaching, must be had, or we shall find we are but entering upon an era of most formidable dangers and evils.

BRITISH BOORS AND AMERICAN FLUNKIES.

The American public seemed to have just received an unexpected shock from the conduct of a parcel of titled blackguards, who were taken upon an excursion west by Rufus Hatch and Henry Villard. Some of the papers, it is true, in a half-hearted, apologetic sort of a way, insist that these fellows were not as contemptibly small and unutterably mean as the general reports depict them, but enough remains undisputed to show that the blue ribbon of these specimens of the much vaunted British nobility might, with a manifest improvement in manners and decency, have been upon the ears of so many prize porkers. To the conduct of these imported boors we take no exception. They were undoubtedly acting out their true natures, and showing the only appreciation of which they were capable, of the civilities and hospitalities lavished upon them. No more should we criticise the action of the Egyptian monkey, or the crocodile of the Ganges, who, recognized as deities, accept with all complacency the sweetmeats and offerings of their deluded worshipers; rather smart, upon the whole, we take it, on the part of both monkey and crocodile, and also of "ye noble Briton." If people are idiotic enough to worship such brutes, our criticism should be for the worshipers, not for the worshiped. But what we do wonder at, is the astonishment expressed at this exhibition of British boorishness, as though it was some new thing, and that Hatch and Villard had unearthed this as a trans-Atlantic trait, wholly unknown before.

We can assure these astonished individuals that this is no new discovery—that the little things they have picked up are mere specimen bricks, of which the British aristocracy have furnished our people whole brickyards, and will continue to do so just as long as our own toadying flunkies will consent to receive them. If there is anything in the world that will justify the average American in wishing himself a Caffre or a Chinaman, it is to see his countrymen paying court to one of these snobs. Who is he? Why, he is Sir Peter Poppleton, of Poppleton Hall. And who is Sir Peter, and where and what is Poppleton Hall? Nobody knows or seems to care. It is quite sufficient that he is a Sir Peter. What does he know, or what has he done? Know! With such a head, with such a make up—the very type of the ideal dude, how could the poor thing be expected to know anything? As to doing, neither he nor his ancestors, for a period whereof the memory of man runneth not to the contrary, were ever known to do anything honorable, profitable or decent. But he is a "Sir," a Sir Peter, and the unutterable pride of the American toady, who can print on her reception cards: "To meet Sir Peter P.," of the American heiress who can enroll among her admirers this brainless, soulless adventurer. How the interviewers reproduce his vapid utterances, and the newspapers chronicle his movements and his purposes, and then if to all this the creature can add a bar sinister in his pedigree—if he can but have it believed that he is in the remotest degree a descendant of the corrupt debauchee Charles the II, that his ancestress was Nell Gwyn the harlot, or the adulterous Duchess of Portsmouth, then the admiration of our tuft hunter becomes all but adoration, and actually verges upon the idolatrous. Aped, imitated and admired, the centre figure of all assemblages, the object of all this brainless adulation, is it strange that these fellows fancy in themselves the superiority that men who on ordinary subjects exhibit intelligence, are so willing to concede. That observing that the superciliousness of which they have an abundance, will be taken in lieu of the sense of which they have nothing, that they furnish their hosts and entertainers with that of which they possess most.

It is this contemptible toadying spirit of our people—well understood abroad—that invites these creatures here, and subjects our people to their presence and their impertinences. Although the lessons they are constantly teaching us seem fruitless, either as a warning or an experience, we rejoice when they are given. When an American heiress, turning with contempt from her own country, throws herself away upon one of these bankrupt, worn-out debauchés and roués, that she may add to her name the paltry prefix, "My Lady," when in her bitterness of soul she knows the moral leper to whom she has bound herself—we neither share in her sorrow, nor sympathize in her shame. She has bartered her birthright for a beast and a bauble; let her enjoy, or endure them as best she may.

When Hatch, Villard, Vanderbilt and the great army of American flunkies are kicked and cuffed, and snubbed and robbed by these blue-blooded boors, and then are laughed at and jeered at by the nation in their sufferings and for their pains, we, too, rejoice, and are exceedingly glad at their humiliation and despoiling. These are the lessons we are constantly receiving—bitter, humiliating—instructive, we trust. We know they will be continued, for there are always those who will never learn either from observation or experience.

CHAPTER V.

WHAT WE SAW IN A MINE.

WHILE visiting one of the most prosperous mining localities of the Coast, a friend said, "Would you like to go down in a quartz mine?" The answer was a prompt affirmative, and a few moments later found us, arrayed in garments adapted to our proposed excursion, at the entrance of a pit which sank away through varying shades of obscurity and gloom, until it ended in cimmerian darkness.

It was not without misgivings that we peered into this yawning pit, but we had gone too far to recede, and with what courage we could muster we stepped upon the platform, and, presto, lo! almost with the velocity of a bullet, we were sinking into the darkness. In the rushing air we were passing through, the utter darkness seemed to take ponderable form and palpable shapes. It was a darkness like that of plague-stricken Egypt, "that might be felt." For an instant and a twinkle of light would flash upon us, and ere our guide could name the level we were passing, it was gone, and we were plunging into another depth of blackness—an abyss of utter night.

There was a numbness in our pulses, a drumming in our ears, and a pressure upon the brain, as these organs strove to adapt themselves to the sudden change; and then, after what had seemed an age, but was in fact but a very few minutes, we halted "two thousand feet from the surface," said our conductor, as with lighted candle, and as men who walk in a dream, we filed after him.

It was a strange, uncanny world we were in, and there was a weird, wicked significance in all about us. The broken and jagged points of the rock looked tooth-like and menacing, as though the tusks and fangs of antediluvian monsters gnashed upon the intruders from the newer world, who disturbed their long slumbers. The timbers were dark and slimy, as though they walled in a charnel house, and reeked with the memories of long hidden graves. Strange fungi clung to them, flabby and pallid, the ghosts of the forms and the flowers of the sunshine of the upper world—here corpse-like and clammy; at their touch your blood chilled and your flesh crept, while these uncanny creations of darkness and of death shrank from the touch and vanished away, as though a thing of life was to them a fatal exorcism.

Around and upon every hand opened drifts and tunnels and chasms, and as you peered into these and strove to penetrate the gloom, the flickering shadows took ghostly shapes, and hideous creatures, with hungry, cruel eyes, glared and glowed upon you. All sights and sounds of the outer world were lost; or if they appeared, it was transformed into fantastic shapes befitting this strange, weird world. From a distance came the sound of flowing water, but unlike the rivulets that sparkle in the sunshine, and dimple in the breeze, with beauty in their every movement and melody in their every murmur; fountains of life at which drank the bird and the lee, and the bright flowers; here it came from the darkness and gleamed with a wicked, baleful light, as though it had ministered at the incantations of a fiend. Its voice the hollow gurgle of the life blood when it follows the assassin's knife. With sinister sight and sound it came, and it fled away as though light and the things of life were its bane and its terror, and the darkness and its horrors its only abiding place.

It was with these sights about us, these sounds in our ears, we made our way to where the active operations of the mine were in progress. There, with a granite mountain above it, locked in a matrix of flint, was the slender vain of quartz for which all this toil was performed—all these perils braved. The miners we had seen in the upper world, but in these dismal paths they too, seemed like men under a spell and transformed by their surroundings. No word of jest, or sound of laughter was heard; but with bated breath they spoke, as men speak in the presence of some danger that may not be averted, but must be endured—as men whisper by a waiting grave. If, perchance, a louder utterance was heard, it was caught up and repeated in hollow, sepulchral echoes that came back from deserted tunnels and gloomy chasms, as though all about were ghouls and sprites that watched, and jeered, and gibed at these invaders of their darksome dwelling-places. No wonder we felt that these men looked upon us with furtive eyes as we thought of the weird shadows, and the mocking echoes, of the loosened mountain which hung over them, of the tomb that perchance each one was fashioning for himself in these dread surroundings. At our guide's request we broke from the ledge a fragment of the precious rock. "Rich," said the miners —and rich it indeed was, and as we held it to the light and turned it in the flickering ray, each shining speck took on a new form and gleamed with a changeful lustre, until it seemed as if the lifeless metal was indeed a sentient thing, alive with the consciousness of its vast and varied capabilities.

Now it was soft and yellow as a summer sunset—then steely and hard and cruel as the light which gleams on the edge of a scimiter—and again with the wicked gleam which flashes in the eye of the serpent, and of things deadly and devilish—and so with each movement came a new phase, till the inanimate lump seemed instinct with life, and purpose, and meaning. Willingly we bade adieu, alike to the facts and the fancies of these cheerless depths, and never seemed sun and skies half so fair as when once again we were upon the surface with these cheerless depths beneath us. We tossed the fragment of rock we had brought from below under the ponderous stamps, and watched as they trampled it to powder, and we followed the turbid stream that bore it on to where the gold and the rock so long united were parted forever, and then in fancy we followed the gold as it journeyed on, now the servant, and again the master of its new-found companion—man. Ductile and fawning it bore alike the imprint of the tyrant as he crushed the people beneath his feet, or the legend of Liberty as she broke the shackles of the nations. It mingled with the streams of commerce and empires found new strength in its coming. Cities sprang into being at its touch, and happiness and contentment marked its pathway. It shrank within the vaults of the usurer, the grasp of the miser, and useless navies rotted beside idle seas. Industries perished and famished mobs filled the land with madness and murder.

It was the gift that patriotism poured into the nation's coffers in the hour of the nation's needs. It was the price of the treason which betrayed the people. It walked the earth with white-winged charity, the minister of good. It went forth with discord, hatred and revenge, and aided in all that was evil. It was the god of the miser. It was the lure of the robber, and he slew the miser as he worshiped at its altar. It was the dowry of the white-robed bride as she stood in her purity at the altar. It was the price of the harlot as she flaunted her shame in the street. In every virtue it was the inspiration or the sharer. In every vice the minister or the means, and so as we saw it, the counterpart of man alike for evil and for good, his second half, in the every walk of life, we questioned whether it was all a fancy that read this in the sparkle and gleam of the mine, and that doubted then whether it was an angel or a demon, whose fetters man was breaking that he might bind it to [illegible] fate and his fortunes forever.

"WHAT THE MOON IS DOING TO THE EARTH."

This is the subject of an article in *Harper's Weekly*, stating that the tides cause a friction on the earth in its revolution that must ultimately so reduce its rate of motion that it will require the same length of time for the earth to revolve on its axis that the moon takes to revolve around the earth. This change, the writer argues, will "destroy all animal and vegetable life; all water will be evaporated; the solid rocks will be scorched and cracked, and the whole world reduced to a dreary barren wilderness. To the same cause the supposed condition of the moon is attributed.

Of course the foregoing is only theory, which every one has the right to express, and we have ours. There are several opinions regarding the present condition of the moon, and it is not by all thought to be the dead and airless world that most astronomers describe it.

If the tides are reducing our rates of speed, they have been at work long enough to give us some indications of it; but just the opposite thing is rather apparent—time is shortening. The summer days are not the long dreamy hours of old; the dawns are now brief, and when the sun passes below the horizon, darkness comes almost at once. Winter evenings used to be long seasons for those inclined to study, and montonous periods for those unprovided with resources, while the night hours were looked forward to as far too long for sleep.

Some may says it is all a delusion of coming age; but such delusions do not come to the young, whom we have heard remark upon the facts named, nor are they apt to befog the minds of learned, observing persons, many of whom have also noted what most persons will consider only apparent changes. But there is cause for them.

That the earth was once a molten mass to its surface must be so if internal fires still exist in its centre, which is generally conceded. It is further conceded that as the earth cools it contracts, and this contraction has but one meaning here—our earth is growing smaller, and therefore increasing its rate of revolution and also its speed through space. These are fast times; we are being brought up by quick turns, and how short they may be when our little planet has grown cold at heart, we will leave some one else to speculate upon if they like.

THE CELEBRATION TO-DAY.

To-day (Aug. 28, 1884) is the one-hundredth anniversary of the death of the pioneer Catholic missionary of this Coast, Father Junipero Serra. To-day, in the renovated cathedral which over a century ago was founded upon the shores of Carmello Bay, by another generation and the men of another race, the priests, rulers and magnates, the wealth, the power, the beauty of the land will assemble at the resting place of the great missionary. With them will come the children of the Indian he christianized and reclaimed, and together the highest and the lowest of the land will unite in the same solemn services, that a century ago had but these earnest Fathers for their participants, and wondering savages for spectators. Like an echo of the olden time those ancient walls will resound with the anthem and the chant, the prayer and the praise, that so long ago dedicated this temple and this land to the faith of the Christian.

This will be indeed a spectacle of absorbing interest, and as those who join in this solemn ceremonial, unchanging and unchanged in all the ages save as succeeding generations take up the strain, a host of memories will troop through the old cathedral. Men will recall the fact that when these walls were building, upon the other shore of the Continent, under stormy skies and upon sterile soil, another band of pilgrims were laying, all unknown to themselves, the other corner stone of a mighty empire. They will remember that then Spain was in the zenith of her power, and that the galleons that brought these priests to these shores returned laden with the silver of Mexico, the tribute of a continent to the treasury of the Spanish king.

They will recall that at that day the priest who was patiently building by the blue Pacific would have been hunted to death had he dared to avow his calling, or administer the rites of his church, in the colonies by the shores of the Atlantic; and as he gazes around him and beholds on every hand now all else save his faith has changed—that side by side, their fears at rest, their hatreds ended, Catholic and Calvinist meet in the spirit of mutual toleration and respect, and all creeds uniting to honor the poor, the patient missionary of a hundred years ago;—when he considers the mountain of bigotry and intolerance that the century has buried forever—the gospel of hate supplanted by the teachings of love, of good will to all, as he beholds all this, the progress of the century, may well and gratefully acknowledge that the world is to-day nearer than ever before, the lessons taught by the Sea of Galilee.

TELEGRAPHIC CONSOLIDATION.

Theoretically any man or company of men can build a telegraph line and convey messages in competition with other lines. Actually, as fast as new lines are built and promise some relief to the people they are quietly swallowed by the Great Western Anaconda. Every time this takes place the stock of the Western Union is watered to twice the amount necessary to buy the new lines. Then in order to pay dividends on all this watered stock, prices must be kept up and the wages of employees reduced. It is no wonder that, knowing these facts, the hard worked operators struck for decent wages and equal pay for all doing like work. But the Anaconda never disgorges. The workman must go to the wall. The telegraph kings must have their "divies" on their original investments and all the added water. Business interests all over the country must suffer until green hands can be taught. The workers who have earned all this vast wealth must work for starvation wages or actually starve. There is a remedy in the hands of the people for all this outrageous injustice. That is, the Government, which is the people, to add telegraphing to the postal system. The Government undertakes to transmit all other letters and papers in order to insure their rapid delivery. Telegraphing is nothing but a system of rapid correspondence. The Government should control and manage this also, and do it at its actual cost. There is no sense in carrying a written letter at its actual cost of conveying it and then turn over to greedy corporations the business of transmitting telegraphic messages. Congress should be compelled to at once assume control of all telegraphing. This can be done in one of two ways. First, condemn to public use every existing telegraph line, instruments and fixtures at their actual value, and then place them under the Post Office Department; or second, as rapidly as possible commence the construction of Government telegraph lines and, as soon as in operation, compel the existing telegraph companies to use on every message, a Government stamp, equal to the Government telegraph rates, as we now do all express companies to use letter stamps. We are likely for several years to have a surplus revenue of near one hundred millions of dollars annually. In case the present telegraph properties were purchased by the Government, bonds could be issued and some of this surplus revenue could be used in paying interest on these bonds until the system gets into working order. When once under way, the Government telegraphing at greatly reduced rates from those now charged, would pay running expenses, interest on the bonds and create a sinking fund for the gradual payment of the bonds. There is not now, and has not been for several years, any reason against establishing Government telegraphing. If the people all over the country would send in enormous petitions to their members of Congress and give them to understand that their political lives depended on attending to this matter at once, the thing could be accomplished at the next session of Congress. This is a matter in which every man and woman in the land is vitally interested. It is a disgrace to the country that Government telegraphy has not long since been in working order. Even slow conservative England is in advance of our boasted country of progress.

HOW A COUNTRY GROWS RICH.

We have lately heard a great deal about the ways and habits of the French nation. Many Americans have been visiting that prosperous country and have marked the striking contrast between their own people and the French in their mode of living. The parsimonious economy and self denial amounting almost to starvation, which the working classes in that country universally practice, is peculiarly observable to those accustomed to see the waste and profusion existing here. It seems as though each nationality carried their several modes of living too far and that each would benefit by the approximation to the ways of each other in this respect; the French by a more liberal allowance to themselves of the necessaries of life, and the Americans by more economy and less wastefulness in the consumption of food and clothing. Last season Paris was the great point of attraction and has drawn into its capacious pockets a goodly amount of American and English gold. The fabulous accounts of the extortionate hotel and lodging house charges, illustrate the universal determination of the lucky householder of the gay capital to make hay while the sun shines. But these careful individuals will continue their habits of economy, even though enriched by such large foreign subsidies. They will not, as our more liberal and extravagant citizens do, spend more money than usual because they have happened to acquire it. Their old habits of economy will be rigidly continued and an increased store of French "rents" or bonds, will be laid aside; whereas, in America, the stately mansions, the dashing equipages and horses, the costly ornaments and jewellery, and a thousand other extravagances would likely absorb the greater part, if not the whole of the handsome profits. These different habits pervade all classes to a greater or lesser degree in these two countries, and the opposite characteristics to our own may well be a lesson worthy of our consideration. Without adopting the almost needlessly penurious regime which is followed by the one, there is great room on our part for more care if we would enjoy the true comfort of being independent and free from debt with its accompaniments of harassing annoyances and degradation.

The great point is to abstain from living on credit and also avoiding the waste of means by the purchase of insignificant trifles, as well as the indulgence in extravagant habits of dress and needless luxuries. The hard times may well teach us a lesson in such matters, and that the true path to comfort and prosperity lies in the reform of our social habits and freeing ourselves from the tyrannical requirements of so-called fashion and the customs of society. In the economical management of our public affairs we may also learn a useful lesson from the example of France. Her central government is carried on with the most judicious regard for economy consistent with her dignity as a nation, whilst her municipal affairs are administered with a carefulness that keeps the rates of assessment at the lowest possible point. There could not be a better illustration of French thrift than the reclamation of the swamp lands of the Gironde. In that region there was formerly a waste plain covering about three thousand square miles. In the winter it was a sea of mud, and in summer, a pestilential morass. Twenty years ago, under the direction of the neighboring Communes, and without any appropriation from the Government, the work of draining the swamps was begun. To-day on this formerly useless land, there are public forests worth sixteen millions of dollars and private forests worth twenty-five thousand dollars. This immense work has been carried on by one hundred and sixty-two Communes. Not only has no debt been incurred, but the Communes have received from the sale of part of the reclaimed land $1,500,000, which has been spent on schools, churches and other public works, and eight hundred thousand dollars more from the same sources, has been invested in the National securities. All these results have been secured by the outlay of two hundred thousand dollars. Thus it was that the German War expenses were so rapidly liquidated by the means supplied by her own people, their savings and economy enabling them to meet so heavy a demand without recourse to foreign loans; and what France has been able to do without crippling her resources, surely the United States could accomplish with almost a tithe of their exertions and none of their parsimony. We advocate the enjoyment of life and comfort for every class, but these can be fully obtained by a simple exercise of thoughtful and practical economy and an abstinence from the waste and extravagance which, so thoughtlessly indulged in, will continue to keep any nation in struggling poverty, however great may be her natural resources and commercial advantages.

THREE VISITS.

The recent celebration of the German Emperor's birthday, calls to mind three marked episodes in a career replete with events of the highest significance and importance. We refer to his three visits to Paris. The first was in the memorable year 1815. Prussia, utterly overthrown by the first Napoleon in the fatal campaign of Jena, had been most harshly treated by the haughty conqueror. Despoiled of nearly half her territory and one-third her subjects,– compelled to surrender her principal fortresses, and to pay an enormous indemnity, nothing seemed wanting to complete her humiliation. The Corsican conqueror, in whose character magnanimity was unknown, found means to still further humiliate his prostrate adversary. Cantoning large bodies of troops upon her inhabitants, prescribing the number of her regular army, he compelled her in 1812 to supply a large contingent to the hosts he led to the invasion of Russia.

When the wreck of the grand army, attesting as it did the magnitude of Napoleon's disaster, straggled through Germany, all Germany, from the Rhine to the Vistula, rose in an unequalled burst of enthusiam against the oppressor. Bautzen, Lutzen, Leipsic, Elba and Waterloo, followed in swift succession, and Prussia was restored to her former possessions. With the allied armies, William, then a youthful prince of the house of Brandenburg, visited Paris, and doubtless looked with wondering eyes upon the city that the extravagance of the Bourbons and the splendors of the First Empire had founded by the Seine.

In 1855 another Napoleon was on the throne of France, and half the potentates of the civilized world were his guests at the great International Exhibition, which was to exhibit the splendor, and attest the power and stability of the empire. Among the royal guests, scarce noticed in the throng of kings which graced Napoleon's pageant, came again William of Prussia. With Bismarck and Von Moltke, his companions, he studied with no careless eye the forces of the Empire—her soldiers, her arsenals and her fortifications, and the resources at her command. These had no ordinary observer, no casual critic in these men, who to all appearances were but part of the glitter and show of a peaceful pageant.

In 1870 William was King of Prussia. Napoleon, distrustful of the power of Prussia, anxious from dynastic considerations to obliterate the recollections of Mexico by victories upon the Rhine, declared war upon Prussia and launched his armies against her frontiers. Never in the history of civilized war were the consequences so fearful to the aggressor. As when some ill-timed blast stirs the avalanche, all Germany rose as one man. Led by her King, and guided by the unerring genius of Von Moltke, she poured upon France like the waves of the sea, army upon army of tried and trained warriors. Unprepared, stunned and bewildered, the armies of France melted before them like frost before the sun,—her armies prisoners of war, her Emperor a captive, her capital beleaguered by foes and girdled by a wall of fire,—it was then before the walls of the doomed city, in the midst of the German hosts, flushed with triumph, with the princes and rulers of the Fatherland about him, Bismarck and Von Moltke, his comrades of twenty-two years before, by his side, in the great Hall of Mirrors of the palace of Louis XIV, William, King of Prussia, was crowned, with high acclaim, Emperor of Germany, and ruler of the realm of Charlemagne.

And when at last, in the strangling grasp of the German armies, famine opened the gates of Paris, the Uhlans of the Prussian army marched in lofty state through the Arch of Triumph, William, of Prussia, had paid his last visit to Paris.

THE DREADED PERIHELION.

The great astronomical event of the present month (April, 1881) is the twenty-year conjunction of Jupiter and Saturn this morning. The planet will be too close to the sun to be visible, but the conjunction is none the less important on that account, inasmuch as only once or twice in a lifetime do the chief worlds of the solar system appear to meet in the sky. Around this conjunction the astrologers have clustered their worst prophecies. They have drawn a horoscope for the world which might well make a nervous person turn pale. The astronomers, however, take a purely mathematical pleasure in this conjunction, unmixed with any fear of famine, plague or bloodshed. Whoever gazes at the heavens this month will see that a great change is going on. The stars that made the winter evenings brilliant are giving place to those that adorn the summer nights. As Sirius disappears in the west, Vega rises in the north-east, glittering in the harp fabled to be the very instrument with which Orpheus made rocks and trees to dance. Just as the last bright star in the giant Orion sinks from sight behind the orange hills, over in the opposite quarter of the sky a very red, flashing star may be seen rising. It is in the heart of the Scorpio. The fable says this is the scorpion that, with one deadly stroke, killed the almost invincible Orion to avenge a woman's wrongs. So when it rises, Orion disappears, and thus year after year the chase is kept up across the sky. In the romance that thus peoples the heavens with heroes and heroines, whose imaginary doings have filled half the literature of the world, resides for many minds one of the chief charms of astronomy.

BLIVENS' OWL.

Mr. Blivens, who resides in the eastern part of the city, has, or rather had, a remarkably fine cat; none of your half-starved, sneaking mousers, but as active a specimen of the domestic feline as ever came from abundant care and petting. Blivens was very proud of his cat, and to his friends was wont to discant on his many marvellous qualities. Its intelligence, activity and ferocity were themes upon which Blivens never wearied, though his auditors might. Plodgers is a neighbor of Blivens and, the other day, as they were going home, Blivens remarked to Plodgers, "You can't guess what I have got in this box," indicating something very like a coop he was carrying. Mr. Plodgers did the amount of guessing necessary to indicate an interest in the question and then gave it up. "It's an owl," said Mr. Blivens, "a big, white owl; I gave a boy up town a dollar for him. I suppose you will think I am a fool, but I just want to see my cat 'Tige' worry him. It will be better than a circus and won't cost any more." "I once had an owl—," said Mr. Plodgers, but Blivens interrupted, "You see, he has had his wings clipped so that he can't fly, and I don't mean to let the cat kill him, but just to let him stir him up and then I shall take him off. You ought to see that cat of mine go for birds. It's simply terrific. I've seen him jump ten feet, just exactly like a small tiger. You just see him light on this owl and you'll say so yourself." Said Mr. Plodgers, "When I was a boy I had—" "I don't think," interrupted Mr. Blivens, "that Tige can drag the owl off before I can get him away, anyhow, if he does and kills him, I shall have had my dollar's worth." With this they reached Mr. Bliven's cottage, and Mr. B. emptied his owl out on the lawn and called for his cat. Tige came running up, but when he saw the strange bird winking and blinking in every direction, his whole aspect changed and he was transformed. Crouching to the ground with flashing eye and quivering tail, he crept towards his victim, while Blivens' expectancy equalled that of his cat. "Plodgers," he ejaculated "'aint that splendid, just look at that action. It's as good as seeing a tiger in his native jungle. Now—" this last as Tige, with a splendid bound, lit directly upon the bird of Minerva. There was a moment's confusion, and then Tige was putting in some of the liveliest kind of somersaults, with the ten talons of the owl locked in his ribs, and his beak in the back of his head. "I don't think I ought to let Tige kill the d——d owl," exclaimed Mr. Blivens as he started for the belligerents; but just at that moment Tige, with his tail the size of a stove pipe, and the owl securely fastened to him as though they were Siamese twins, dashed off. Away he went, through a thicket of blackberry briars he sped, with a wake of fur and feathers, in a cyclone of dust and caterwauling—away he dashed across the garden, and Mr. Blivens gave up the chase. And as he returned, gathering fragments of the cat as he came, he got the concluding remark of Mr. Plodgers', "had an owl once when I was a boy that killed all the cats in my neighborhood."

Mr. Blivens does not talk much about owls just now, but Mr. Plodgers requests us to mention that if any one shall find an owl with a cat attachment, it is probably Mr. Blivens' dollar investment.

THE QUAIL.

Most persons who have noticed the large flocks of quail, apparently but a single brood, that are found in the summer and autumn, have wondered how one bird could hatch such a number of young, or could provide for them when hatched. The explanation as to the number is often given that two or more birds have laid in the same nest, while it has been generally assumed that the parents proportioned their diligence and assiduity to the numbers dependent upon them. The writer has several times had an opportunity of observing the course pursued by our valley quails, and has been greatly interested in it. After pairing off in the spring, the female quail selects some secluded place for her housekeeping arrangements, and lays her eggs, varying in number from fifteen or twenty to twice or thrice that number. The theory that two or more birds unite to produce the large broods seen is quite unnecessary, as we have seen a pair kept in a coup where the hen laid seventy-five eggs without showing any disposition to set. Probably in a wild state and compelled to range for food, the production would be less; but we see no reason for supposing that under reasonably favorable circumstances one bird might not lay three or four dozen eggs. The place selected for the nest is usually some small cavity or depression in the soil, by the side of a stone where some plant has been partially uprooted, or in the track of an animal. The eggs are not distributed in a layer as in domestic fowls, but are piled one above another as they would be in a basket. Upon this pile of eggs the hen establishes herself, while her watchful lord stations himself upon some neighboring eminence, a fence, rock or tree, and looks out for intruders, occasionally relieving his spouse by covering the eggs while she is hunting for a hasty meal. For twenty-seven days the little bird keeeps her patient vigil, and then comes the reward. A host of downy, bright-eyed, restless beauties swarm before her. A peculiar note apprises the father of the event, and wild with excitement he flies from his perch to the nursery and back, his every gesture and note betokening his enhanced importance and his anxiety. But a few hours from the first symptom of life in the eggs, till all of the brood are out, at least all that are to make a successful exit, and off starts the mother with her brood around her. What life there may yet be in the eggs remaining in the nest, what infants there may be still picking at their prison walls, she does not consider. The wants of those who are in sight, the hungry little ones about her absorb her every faculty; and as indifferent to what she may be leaving behind as though they were pebbles and not her struggling offspring, she starts with such as can follow, and those she leaves behind are left forever. And now comes the explanation as to how this hungry horde is fed. A moment's consideration makes it plain. Each little quail does his own foraging. Along walks the mother with head erect and eye alert for either food or danger, and for a space of two or three yards on either side travel the covey. Everything that comes before the little quail that looks as though it might be food is picked up, seeds, bits of sticks or leaves, gravel, insects and their eggs, small worms, all are tested, and by some sense, as swift as it is unerring, the edible is swallowed and that which is not is dropped. Occasionally, by a scratch, the mother uncovers a bonanza of a nest of ant eggs, seeds or small grubs, and with a cluck her brood are called to the treasure; but generally with a call peculiar to her mission, she keeps them within a few feet of herself as she takes her cautious and watchful way. Fifteen or twenty minutes of this foraging, and with a marvellous appreciation of the feebleness of her brood, she calls them to her, and a half-hour siesta renews their vigor, and the march continues. And so on with intervals of feeding and of rest, with a wider range and longer periods of foraging, as their strength increases, she brings forward her progeny. From the first marvellously swift, in a few days they make quite a fight, and are soon able to escape or elude most of their natural enemies. In nothing is the instinct of the mother quail more noticeable than in that which teaches her to abandon the few for the security of the many. From the moment she walks away from her half-hatched offspring, the same spirit guides all her movements and determines her every action. Should one of her brood be crippled or feeble, she makes for him no delay. Her movements conform to the capacity of the strong and vigorous. To pause for the feeble is to peril the strong. Observe one of these waifs that this inexorable mother leaves behind her under shelter of a leaf or a bunch of grass, and you will find him in a slumber apparently as profound as that of death. Pick him up and a feeble struggle is all that shows his consciousness. Lay him down and he will dart away for a few feet, and in a moment he is again sleeping as before. Mark the spot, and an hour later you will find him dead—that the little life so shortly run has passed away, as painlessly as that of a flower. And so, holding together the strong and abandoning the feeble, the mother winnows out the weaklings of her brood. Each day with a longer circuit and a wider range, is the test applied and the feeble abandoned, until those equally strong, equally vigorous remain. No more apt illustration of the modern doctrine of "selection"—of the survival of the fittest—can be found than in the career of a brood of young quails; and this is why our hunters always find all the birds in a covey alike perfect, active and vigorous.

HOW MR. McGONIGLE DID NOT TESTIFY.

A divorce case was recently on trial at our District Court. The plaintiff with her female friends had told her grievances and the ill-treatment to which she had been subjected by the defendant, all of which a party by the name of McGonigle had witnessed. In due time the attorney called Mr. McGonigle, and, with a look that plainly bespoke his appreciation of his own importance, Mr. McGonigle took the stand and was sworn. "State," said the attorney in his most insinuating manner, "all that you know about this matter." To which suggestion Mr. McGonigle replied: "I'm thinking I'll be after having me fays before I spake in the case." "Certainly," said the lawyer, and he rushed into his pocket with a promptness that boded immediate results; but as the lawyer went lower he went slower, and when he came up the "fays" in which Mr. McGonigle had expressed such an active interest were not forthcoming. The attorney looked imploringly at the Clerk, but that official's countenance said, as plainly as looks could say, that, between himself and Mr. McGonigle, he preferred the Clerk. "Two dollars and a quarter, if you plaze," murmured Mr. McGonigle. The lawyer looked at his fair client, and she gazed impassively at the skylight. "The fays," repeated Mr. McGonigle. "Exactly so, of course," said the lawyer; "but are you quite sure Mr. McGonigle that you know anything about this case? Are you the gentleman that all the witnesses spoke of, the one that saw these acts of the defendant?" "Indade I am," said Mr. McGonigle. "And you saw all this pushing down and dragging out by the defendant?" "Of course I did, I saw it all," said Mr. McGonigle promptly. "Ah, you did," said the lawyer. "Well, we will try to get along without you, Mr. McGonigle. That will do. We will excuse you," said the lawyer, blandly bowing Mr. McGonigle off the stand. Mr. McGonigle took his seat among the audience and wondered how they could get along without his testimony, and what they were all laughing about, while the lawyer took out his little note-book, credited himself with two dollars and a quarter, and remarked to the Clerk, "A very sage remark that of Old Solomon, that wisdom is better than great riches."

THE CAUSE AND THE CURE.

This is not the first time (April, 1878) that California has passed through a season of depression, droughts and earthquakes. The attractions of different mining localities have each in their turn checked the prosperity of the State and threatened its future advancement; but from each and all she has risen with renewed vigor, apparently strengthened by the shock that arrested for a moment her progress. In seasons of drought, the land but rested that it might pour forth a more abundant harvest. From the mining regions of the North returned alike the successful and the disappointed; the first to enjoy on these favored shores the fortune elsewhere won; the last, to renew here the struggle that had before proved fruitless. While rocked in the rude cradle of the earthquake, the young giant by the Golden Gate rose like the creation of an enchanter to the foremost rank in the cities of the world. Nowhere was the fickle goddess Fortune so lavish of her gifts; nowhere were labor and enterprise so liberally rewarded; nowhere the stream of benevolence so broad, the hand of charity so lavish.

To be a citizen of the Golden Gate—to have been one of its pioneers—was an honor that outweighed all considerations of fortune, birth or vocation; and class distinctions were unknown, or, if pretended, were but the food for bandinage and pleasant jest. When upon this community came misfortune and depression, it but banded them more closely together. The credit of one merchant sustained the tottering fortunes of his fellows and the miner shared with the stranger his blanket and his bread. Calamities thus shared were half averted, and the magnanimity of the citizens was well nigh a universal insurance against the misfortunes of men. To-day a depression unparalleled in the history of the State is upon us, blighting and withering, not only every industry, but poisoning the very channels of sympathy and kindling in every community the fires of rancor and hate. What has brought this condition of things to our doors? What has enshrined this demon of discord in our midst? It is not that the season has been unpropitious. The promise of a more abundant harvest never gladdened the heart of the husbandman, while the presage of European war assures a remunerative market. It is not that capital is wanting. The vaults of the banks are groaning with their golden store; while unused millions are travelling eastward for more secure employment. The cause is so clear "that he who runs may read and the wayfaring man, though a fool, may understand." It is the preaching of the gospel of hate by the alien emissaries of Communism that has paralyzed capital and palsied labor, leaving the rich without revenues and the poor without bread. It is Communism in its most despicable form—Kearneyism, that, like a hideous python, is crushing the very vitals of the State. Is it a wonder that the times are hard—that mechanics cannot find employment? Kearney proposes for San Francisco the fate of Moscow. Is it strange that they do not build for this wretch to burn? He announces that when the Chinese are butchered he will turn his attention to Capital. Are capitalists likely to be lured to King Kearney's domains? He proposes a saturnalia of rapine, of bloodshed and of flame. Is it strange that the timid flee from the State cursed by his presence, as from a sirocco, and that none come hither? San Francisco by a supineness as astonishing as it is criminal, has suffered this pest to innoculate with his virus the honest laborers of that city, and the infection has extended well-nigh through the State. To-day hundreds of unemployed laborers of San Jose may well curse Kearney for their enforced idleness. Scarce a building has been erected here or elsewhere in the State. Kearneyism has finished the cities of California as effectually as Vesuvius did Pompeii. And so they will remain with the army of mechanics seeking employment in vain, while the question is in abeyance whether Kearney or Law shall hold dominion on this Coast. Fortunately for our citizens, for the honest, industrious laborers of this city, the cure of this plague is in their own hands, and it is for them to say whether they will apply the remedy thus opportunely afforded. Let the election of to-morrow give no uncertain sound; no more vital issue was ever presented to a community. Shall industry and commerce feel the life of renewed confidence coursing through their veins? Shall the laborer find employment—his family bread? Shall the citizen have protection? Shall capital have security? Shall peace, prosperity and contentment be re-established in the community? Or, shall Kearneyism with its attendant plagues reign over us? Again, we repeat, the cause is before us, the cure is with us. Let no man be found wanting.

INTERNATIONALISM.

There is a clamoring spirit abroad in the land that will not down at any man's bidding—the spirit of Internationalism. It means the correction of radical abuses in taxation, in the division and use of the soil, in the rights of property, in politics—correction of great existing evils by peaceable means if possible, by force if necessary.

That the elements of leadership in this movement are largely composed of turbid revolutionists—red rioters of the most unprincipled and impracticable class, cannot be denied; yet that there is an upward pressure of the toiling and oppressed masses, a struggling for life and bread, that forebodes a civil and political earthquake of the most direful character, is apparent to the clearest thought and understanding of the age. The poor man plodding in toil and penury, and honestly struggling to provide food and shelter for his family—seeing in the face of all his best efforts, his children growing up in ignorance and rags, may well ask, why is it that others, no more worthy or industrious than he, are permitted to encompass vast domains of soil and enjoy all the luxuries that wealth can afford; men, too, many of them, who have attained to their o'er-towering position through fraud, aggression and wrong; through distortion of justice, manipulation of courts and legislative bodies and abuse of public trusts. Why is it, he asks, that he should be taxed to the full value of his little possessions, while the princely landlord is required to pay only one-tenth or one-twelfth of his? Why is it that law and legislation are constantly tending to make the rich richer and the poor poorer? That his labor should be mortgaged against his will to keep another man in affluence and luxury?

We are not arguing the merits of the question, but simply indicating the drift of the undercurrent that is likely at any time to break forth in a seething, overwhelming flood, bearing away on its turbid crests all aristocracies of wealth and caste. Aristocratic and purse-proud England is already mined with Internationalism. It needs but a breath to ignite the torch of revolution in the overcrowded districts of Birmingham and Manchester. Once the standard of revolt is raised, there will not be wanting some Cromwell to bear it to the front. The oppressed and down-trodden of other lands will catch the inspiration of the occasion and rise in sympathy with their struggling compatriots. Then who shall say where the end will be? This is no idle fantasy, though the rich and proud are blind to its significance. It should teach them the necessity of conciliation, of just laws, of honest rulers. It should check their grasping greed for vast possessions at the expense of the happiness and comfort of others. In short, it should impress upon the minds of all that the humblest tiller of the earth, or delver in the mine, or toiler on the sea, has a natural and inherent right in the sources of all things that sustain life—a right that the whole world should respect.

A MATHEMATICAL MYSTERY.

It is often and incorrectly said that women have no aptitude for mathematics. So far is this from the truth that there are certain departments of mathematics in which women are vastly more skilful than men. If a man is asked how much it costs him to smoke four cigars a day at fifteen cents a day, he will reply, "Oh, perhaps a hundred dollars or so," which is manifestly incorrect; whereas, if the same question is asked his wife, she will instantly answer that her husband wastes about seven hundred dollars a year in smoke. Captious critics may point out that this sum is too large, but it must be conceded that while there is a little surplusage in the wife's calculation, she does not make the fatal error of underestimating the amount. In accordance with the principle that the greater includes the less, her calculation is essentially correct, whereas the smoker's calculation is utterly wrong. The skill of women in handling figures is also shown every Sunday in the year. When on Sunday evening the ladies of the family bring out their particular religious newspaper and grapple with those amazing problems which begin: "I am composed of thirty-five thousand letters; my 1, 9, 365, 17, 4, 11, 44 is an Amalekite plumber," the male members of the family circle know that though they could not solve the problem even with the aid of six calculating machines, the women will solve it before they go to bed if it takes them all night. In these and several other branches of mathematics woman is easily supreme, and it is an error born of ignorance or malice to accuse her of a want of mathematical genius.

When, however, we come to mensuration we suddenly find the limitations of the female mind. A deep-rooted hatred of all accuracy in measurements, or, at all events, a total inability to understand the yard-stick or the tables of dry measure, is one of the prominent characteristics of the sex. No woman, for example, can form any correct idea of the distance from her house to any other geographical point. If she wishes to go to any place she firmly believes it is "only a few steps," no matter if it is in reality miles away; and if she has, by force of circumstances been compelled to walk unwillingly from, say Sixth street to the Public Library, she will subsequently maintain that she has "tramped all over creation," and "is almost tired to death."

Every man who has entrusted to a woman the work of manufacturing a shirt has had painful experience of her inability to comprehend the importance of accurate measurement. Mr. Smith, for example, permits Mrs. Smith to make a new shirt, to be modelled precisely after an old one which measures, say fifteen inches around the neck. When the new garment is completed Mr. Smith finds that it chokes him, and calls his wife's attention to the fact. She declares that it measures precisely the same as the model, and, appealing to the tape-measure in proof of her assertion, finds that the new shirt measures only thirteen inches around the neck. Under these circumstances a male shirt-maker would confess that he had made a mistake. Not so Mrs. Smith. She exclaims with every appearance of triumph, "There, what did I tell you. One is almost exactly the same size as the other. There isn't two inches difference between them." Nothing could illustrate more forcibly woman's total inability to grasp the importance of accurate measurements. A being who believes that a thirteen inch band will fit a fifteen inch neck with as much accuracy as if the band were two inches longer, is born without any sense of the value of linear measure. As a rule women decline to recognize the authority of yard-sticks, measuring tapes and other standards, but place a pathetic faith in their own fingers and thumbs. They have constructed for their own use certain tables which pretend that the upper joint of the thumb is exactly one inch in length, that the width of three fingers is an inch and a half, and that the distance from the point of the nose to the end of the outstretched arm is a yard. These are the only measures they will use when seeking to ascertain the length of a piece of piping cord or the width of a skirt-breadth. It is needless to say that they are thus led into constant error. The female fingers and arms and noses are not constant quantities so far as their length and breadth are concerned, and to make them standards of measurement is as absurd as it would be to assume that the human foot is always twelve inches in length, whether it be the San Jose foot or the Chicago foot.

What is very old is the fact that in the department of cookery, women make an elaborate pretence of their regard for careful measurement. They have rules for finding the exact quantity of each article that enters into the composition of any particular dish. For instance, their cooking liturgies prescribe that in making cake one must take a cup of flour, six cups of butter, two dozen eggs, three cups of salt, a teaspoonful of indigo, a tablespoonful of starch and three cups of molasses. But do they ever follow this rule? It is notorious that they pay no attention to it. When a woman undertakes to make cake, she takes what she calls "enough" flour, and to this she adds "a little" indigo, starch and salt, and stirs into it as much butter and molasses as "is needed." Of course the result is always unforeseen. It may turn out that the compound thus made is cake and it may prove to be rice pudding. The woman herself has not the least idea what it will be. With the printed rules for cake lying before her, one would suppose that it would be impossible for her to produce anything but cake; but in actual practice she utterly scouts the rule and makes her mysterious compound by the light of nature, and humbly trusts that it will not come out of the oven as sausages or boiled ham. Why women have this antipathy to measurements of all kinds is a mystery. They can add or subtract; they can multiply and they can divide; but here their capacity for any mathematical truth ends. There is, indeed, as Sir Isaac Newton sadly remarked, something very mysterious in women, and the less we try to find it out the better.

BAROMETER AND STORMS.

We often hear it said that however reliable the fluctuations of the barometer may be in other sections, as indicating the approach of storms, upon the Pacific Coast some exceptional rule or, rather, no rule exists, and that the variations of the barometer really indicate nothing. And when we find, as we often do, that the movement of the mercury accompanies, instead of preceding by hours and days, storms of wind or rain, we are very apt to regard instrument and indications alike as wholly unreliable. A moment's consideration, however, of the atmospherical phenomena which induce barometric changes, in connection with the peculiar topography of this coast and its situation relative to the great source of storms, will show the same unvarying law governing here that prevails elsewhere and everywhere. The mercury of the barometer rises and falls with the changing pressure of the atmosphere. Whenever, from any cause, the atmosphere upon the surface of the earth becomes lighter than the surrounding areas, a current immediately flows in this direction until the equilibrium is restored and the extent, area and character of this diminished density determines the extent and direction of the currents that must flow to restore equilibrium. The fact of a partial vacuum that must be supplied, the knowledge of the direction from which the atmospheric streams usually flow that replace such vacuums in a given locality, the probability that such currents will be dry or will be saturated with moisture—these are the elements which determine the value of the barometer and give such importance to meteorological observations. Besides this, by means of the telegraph, with a storm once in progress, its course, character and velocity are often heralded in advance with almost the certainty that the same medium communicates the progress and approach of the railroad train. But, to be able to announce in advance the approaching change requires some distance in space and area to intervene between the cause, the local disturbance and the forces that are to restore the equilibrium. Thus, if a marked barometrical depression should be observed in the Great Salt Lake basin, before its effects would be felt upon either seaboard many hours or even days might elapse, and abundant opportunity afforded to predict its movement and character. Upon the Pacific Coast no such area for extended observation exists. The aerial currents that pass the equatorial belt and, laden with moisture, flow north in a direction nearly parallel with the coast range of mountains, upon any local disturbance either in the great valleys of the coast or in the deserts to the eastward, are at once supplied from the water-laden atmosphere that masses upon our Western Coast. The distance of this saturated atmospheric air-belt is not over one hundred miles, and, as ordinary storm clouds travel at a rate of from forty to one hundred miles an hour, the barometer can scarcely denote the depression before the water-laden stratum is before us in a storm; the effect following so closely upon the cause that the interval is scarcely perceptible. Where the disturbance is further to the eastward and is very extensive and pronounced, the storm it indicates may often be predicted in advance. The meteorology of this coast not only conforms to the rules everywhere observed, but, from the peculiar situation of the coast and the immediate vicinity of the great evaporating ocean of the globe, the phenomena of our seasons and storms are characterized by an exactitude and simplicity that is found in few other places.

FOOLISH ACCUMULATIONS OF MONEY.

One of the best example of the utter folly of enormous accumulations of wealth for heirs was that related in a news item we published yesterday. A prominent citizen of New York left $2,500,000 to his four minor sons, but at the end of fourteen years it had been so badly managed by executors and so lavishly squandered by older sons, that the estate was nearly used up when the younger sons came of age. It had been of no use to the sons except to corrupt and demoralize. Most of it was recklessly thrown away in foreign countries. None of it did anything to benefit humanity, society or the world. Notwithstanding these yearly recurring examples, we see men straining every nerve to lay up money for children; cramping their intellects and starving their souls for money to be spent in riotous living or dissipation in litigation. As a rule rich men's sons are failures. There is but one road to usefulness, and that is the narrow, winding way of toil. The worst enemy a boy or girl can have is a parent who furnishes them with all the money they want, gratifies every wish and neglects to compel them to learn some useful occupation. This is a world of use. There is no room in it for drones or dudes or dilletanti. The man who carries brick or mortar is of infinitely more consequence to the world than any effeminate scion of wealth who spends his time in mere selfish and sensual gratification. The men of action and energy who accumulate large fortunes never act so foolishly as when they neglect during their lives, to appropriate the larger part of their accumulations to some enterprise which will benefit their less talented and less fortunate neighbors. It is foolish to provide by will for beneficent undertakings. It is much wiser to personally supervise the execution of their own plans for the disposition of their funds. They have thus a double pleasure; the pleasure given by success and the pleasure which a rational disposition of their means is sure to afford. No board of trustees or executors can as well carry out the wishes of the legator as he could do himself.

NATURE'S RECORD OF THE SEASONS.

It has been a matter of almost universal observation that all varieties of trees, both fruit and ornamental, have made a very small as well as imperfect growth the present season. The cause universally and no doubt properly assigned for this is the light rainfall of the past winter. As each year's growth is evidenced by a new ring in the wood of the tree, and as the width of the ring must be wholly dependent upon the vigor of that year's growth, it is evident that the ring formed the present season will exhibit a very meagre growth for all the trees within the area of the present drought.

If this be so of cultivated trees grown in the valley, in which artificial irrigation has measureably compensated this requirement, and in which a subterranean reservoir aids to equalize the season's deficiencies, much more marked should be the disparity exhibited in forest trees grown on the hills upon uncultivated land, and dependent solely upon natural conditions, and where neither artificial irrigation nor subterranean supply makes up the deficiencies in the rainfall. And a careful examination of a number of such trees, so situated as to be wholly dependent upon the rain actually falling upon them, and not assisted by the vicinage of rivulets, springs or other special conditions, might furnish a most valuable record of the rainfall of centuries. If the examination embraced a number of trees over an extended area, the result would be still more satisfactory. The results of these examinations could be compared with the recent records of the meteorology of this coast. For the past twenty-five years we have an accurate record, and for a period of fifty years, quite satisfactory information as to seasons. These periods embrace several severe droughts and many years of insufficient moisture. Should the diminished size of the rings upon a number of trees be found to correspond with one of these years of drought; should the rings of the intermediate years show uniform dimensions; should another small ring be found to agree with another dry year; and should these coincidences continue in a number of trees as far back as authentic records exist, no person would question that similar appearances in these rings represented corresponding seasons during the ancient period in which records were not kept by men. Were such correspondence once established, every tree that might be felled for all future time would furnish additional data for verifying, correcting or disproving these conclusions, and possibly a very instructive record might be found, established by Nature herself and embracing many centuries in its duration. Of course, it may be that such coincidence may not be found, and that no such rule exists. That it may, is certainly within the bounds of possibility, not to say of a very decided probability. In other countries the growth of trees is affected by a great variety of disturbing causes. A winter of unusual severity, a cold summer or a drought would affect the vigor and growth of trees. But the meteorology of this coast is exceptionally uniform. As to temperature, the summers and winters show a uniformity without parallel. The only variation is in the rainfall, and in that respect the differences are sufficiently marked and the immediate consequences sufficiently apparent to justify us in supposing that some evidence of their recurrence may be retained by the trees that have struggled through them. The cost of such an inquiry as is here suggested is trifling. A cross-section of any oak felled the present season would furnish one of the factors, and a similar section of every additional tree would enhance, in geometrical ratio, the probabilities of a correct conclusion. Let the trees examined be those that were living this year. Let their location be such that they are watered only by the rainfall. Let the direction of each tree to the points of the compass be noted, and we shall not be surprised if more satisfactory and reliable evidence is produced from these silent witnesses of the centuries than from any human archives, doubtful recollection or misty traditions of men.

THE ARIZONA SENATOR.

This they tell of John O. Smith. It was while he was Superintendent of the Blue-Point mine, but before he was in the Bonanza. A party of capitalists owned mines in Eastern Nevada, in a district that lay on the east of three or four hundred miles of sage brush and alkali, and had made up a party and chartered a coach to visit their new possessions. Three solid chaps, worth a million or two apiece, and Smith with about three millions in fun and deviltry, and about seven dollars in cash, made up the party. By way of utilizing John O.'s exuberant vitality he was made the treasurer of the expedition. Smith accepted the position with becoming dignity; took all the funds of the company and disbursed them with his characteristic generosity. They had not been long on the desert before the patrons of the Cosmopolitan and the "Poodle Dog" wearied with the fare of the way stations. Rusty bacon, tough flap-jacks and alkali bread lost all their charms for them, and their advent at each station was signalized by a systematic raid upon any or all special delicacies that could be found. It was while this was the course of procedure that Smith concluded to introduce a little variety into the programme, and he only waited fitting opportunity to give his companions the benefit of his fertile fancy. The occasion came when they reached "Wild Jim's" station, the worst of the stations on the road, and in the most desolate part of that forbidding region. "Wild Jim" seemed created for the place. The outlaw of every community that had been graced by his presence, he lived there for the simple reason that he knew he would not be suffered to live anywhere else, and his time was divided between plundering emigrants, stealing cattle and fleecing the way-farers that halted at his den for refreshments. It was at this inviting place that the party stopped for dinner, and the money-kings spying a small flock of chickens, directed Wild Jim to kill a couple for their dinner. "Not much," said Jim, surlily, "them chickens is for stock. and the feller that gits 'em will have to come out, he will." "That's all right," said the hungry Midas, "you give us the chickens and fix your own price." Jim took a look at the party, made a mental calculation as to what could be charged, pulled out his revolver and off went the heads of a couple of chickens with a skill and celerity that charmed the hungry beholders. While the Indian that Jim had impressed into his service was preparing the fowls, and the rest of the party were stretching their limbs, Smith sauntered up to their fascinating companion and, by way of introduction, insinuatingly remarked: "Rather a pleasant place you've got here, my friend." "I suppose a feller would think so if he'd just got out of hell," was Jim's sententious reply. Smith took another tack. "Acquaintances of yours, these chaps, I suppose?" he remarked, pointing his thumb towards the financial men of the party. "Never seen 'em before ; Frisco bug-eaters, I reckon ; but they've got some chickens to pay for, they have," said Jim. "I hope they will pay you for them," suggested John O. in a tone in which doubt of the proposition and sympathy for Jim were exquisitely blended. "You needn't hope anything about it, stranger," responded Jim, "I know they'll come down for them chickens, I do." "Well, perhaps you do," remarked Smith. "I have been with them chaps for three days and this has been their style at every station—make the folks kill their chickens and living on their best and not the first red cent has one of them paid yet." "The h—l they haint," ejaculated Jim. "I'd like to know how they got by 'Old Tom's' and kept their scalps." "Oh," said Smith, "they seem to get along ; they say that some other chap is going to pay for them, or that they will settle when they come back, or something of that sort. Perhaps they'll pay you ; I really hope they will," remarked Smith pathetically, as he walked off. Wild Jim communed with himself for about a minute ; then he got a club and stood it just outside the door ; then he hurried up the Indian cook and the dinner at a rate that was perfectly astounding to the sedate aborigine. In due time dinner was announced. It was served by Wild Jim in person, a piece of condescension on his part that was wholly unexampled, while he pressed his guests with the chicken in a way they could neither understand nor comply with. "You'd better clean it all up," he urged. "You've got it to pay for and you ought to have it all," he insisted. Smith declined the chicken. He didn't like chicken much anyhow, he said, and besides he didn't like the idea of taking the man's chickens as they did, a suggestion that was received with uproarious laughter and a sardonic grin upon the part of Wild Jim. Dinner over, Smith stepped out and asked his host for his bill. "Not a cent, pard," said Jim. "You've done the square thing by me and guv me a pint, and when a feller gives me a pint, he's got me, he has." Smith concurred in the sentiment, but insisted that Jim should take five dollars for his dinner, adding feelingly, that he would lose enough anyhow. John O. then esconced himself in the coach, lit a cigar and awaited developments. Jim cast an admiring glance at his sympathetic countenance and then stepping to the coach, "Shake hands, pard," he said, and as Smith complied he added : "You're going to have this shebang to yourself, you are ; them chaps is going to stop with me ; they want more chicken. Do you know, pard, in about three days a grasshopper will look bigger to them fellers than a Texas steer, it will." Meanwhile the objects of these gracious attentions had finished their cigars and were sauntering towards the coach when the foremost was confronted by Jim, who, presenting his club by way of bill, remarked : "I'll take your fare for that chicken dinner if you've no objections." "That gentleman in the coach will pay you," said No. 1. "Oh, he will, will he. He'll pay yours, too, wont he ?" said Jim sarcastically, to No. 2. "Maybe," replied No. 2, "or perhaps I'll pay it myself when I come back." "Haint you got a friend comin' along'll put up for you ?" queried Jim of No. 3. Hugely amused at the proceedings, No. 3 replied that he did not like to bother his friends with a little matter like that, and would prefer to owe him for his dinner. "Yes," responded Jim, with a prodigal mixture of profanity, "I've heard of you bummers before; there's to be no foolishness about this camp ; you'll come down with the coin or I'll just set every one of you up with a hide full of the worst mashed bones you ever see, I will those," and Jim looked so truculent and so decidedly in earnest that his auditors concluded to cease their chaffing and get away, so No. 1 called out, "Here, Smith, pay this man for his dinner and let us get off." I believe I have paid for my dinner, haven't I ?" remarked Smith to Jim." "You have that," said Jim, " like a gentleman." "Well, pay for ours ; what the devil do you mean ?" chipped in No. 2 impatiently, "Perhaps you would like me to pay yours ?" queried Smith of No. 3. "Of course," responded No. 3, "and quit this cursed tomfoolery." "Well, that's what I call good," replied John O. "Is there anything else you'd like me to pay for you. You must be agents or sewing machine men—more cheek than I ever saw for chaps of your size. A man does pretty well those times that pays his own way. I have quit paying bills just because chaps ask me to," and Smith leaned back in the coach and complacently puffed away at his cigar. The three outsiders looked at each other and at Smith and took in the situation.

There was no way to get at J. O. without getting by Wild Jim, an undertaking that did not look particularly promising. "Well, what is your bill," said No. 1. "Five dollars a head," said Jim, "and you'd better come down d—d soon or I'll put an extra head on each one of you and then make it ten dollars apiece." The three millionaires walked off to inventory their finances, Jim with his club in close proximity. "We don't need your company, sir," said No. 1, with great dignity and no little asperity. "P'raps not," said Jim, "but I want yours and I don't mind the exertion, besides I've got lots of company to spare—I'm just full of it. I'm going to stay with you gents, I am." There was no help for it, and, with Jim standing guard with his club, they went through purses, pocket-books and pockets, and scraped together all the small coins that had escaped the general disbursement to their quondam treasurer. It took quarters and short bits to make it up, but it was finally done and they were finally permitted to enter the coach, Wild Jim favoring them with these comforting suggestions as to their future treatment. "Took the last dime, them chickens did; not a red cent in the whole d—d crowd. Nice time you'll have at Injun Jake's, next station. I'm reckoned an angel when Jake's about. He can run a station, he can. He'll make you eat or he'll chaw your ear off, and he won't make you pay, oh no, guess not. Jake's just waitin' for you, he is; he'll take Smith for pay or wait till you come back, oh, yes." And into the desert and away from Wild Jim's objurgations rolled the coach.

Smith's pards concluded it was no use trying to get even for that performance, and did not undertake it.

BURDENS AND WHO BEARS THEM.

While there is no want of grumbling over disparity in worldly possessions or the distinctions as to taxation, the grossest of all discrepancies in our social burdens passes comparatively unnoticed. We refer to the burdens imposed by benevolence—the claims upon private charity. These claims, constant, frequent and multiform, embracing as they do the urgent necessities of one universal brotherhood, seeking alike to relieve the sufferers by the floods of the Danube and those famishing by the droughts of Hindoostan; the survivors of the cyclone, the plague and of the earthquake; demands which recognize alike the claims of a common humanity and the needs of the immediate neighborhood. These demands, which should meet with an equal response from all, it is a notorious fact, find their recognition at the hands of a very inconsiderable few. That however apparent, immediate or pressing the exigency, to meet it and relieve the want always devolves upon a small minority. So well is this understood that whenever charity is solicited, no matter what the object or who may be the solicitors, certain individuals are uniformly and successfully approached while others equally accessible and able are as uniformly shunned and avoided. Experience has instructed the general community that while from the one they will certainly receive courteous treatment, and generally assistance, from the others they will receive but a rude repulse and often insult. The consequence of this is that by far the greater part of that relief which aids the sick and the helpless, which seeks to allay calamity in whatever form it may present itself, devolves in all communities upon the very few. That this will always be the case cannot be questioned. In so many forms will suffering and want present itself that provision cannot well be made in advance for its many exigencies, and so doubtless for all time an undue share of these burdens must fall upon those found thus willing to bear them. But while this inequality cannot be wholly avoided, it should not be extended, and all that legislation or law can accomplish should be done to apportion among all, the burdens as well as the benefits which result from our social organization. The only manner in which this can be accomplished is to make of all those charities which are justly a claim upon any, a charge upon all, by aiding them from the public revenues—from the fruits of equal and common taxation. It is by such means that many of these burdens now imposed upon the few, are made the proper charge against all; that the selfish and the avaricious are placed upon an equal footing with the liberal and the charitable, and that equality in duty as in right, is made the common obligation upon all. Why, for instance, should a poor man, scarce able to maintain his family by his personal exertions, be required to pay for the maintenance of his wife or child in the insane-asylum of the state? It is for its own purposes or its own protection that the state orders this person placed in the state institution. It is her citizens that she thus seeks to protect. The unfortunate man who is by this misfortune deprived of his companion, who is compelled to make such provision as he best may for the place thus left vacant in his family, is further charged with the expenses of the state's interference and is made to pay for it, unless it is utterly impossible for him to do so. Why should not the state and those who have not been visited by such a calamity, take upon themselves the small part of maintaining in her institutions these hapless citizens? Why add a special tax to the overwhelming weight of the relatives' misfortune? Why should the strong, the avaricious and rapacious be permitted to monopolise the world—to hold under the forms of law all that it possesses of value and then withhold the most paltry pittance from the feeble and helpless. There is but one way to deal with this class or with those absentees who, holding property here, expend its revenues elsewhere; with the many whom avarice, absence or accident place beyond the reach of charitable solicitation.

Let these bear their part in these common burdens through their contributions to the public revenues, and let it appear that if fortune has given to a favored few the good things of this world she has charged her gifts with a trust which they cannot avoid and will not be suffered to escape.

EDITH O'GORMAN.

This somewhat notorious and shameless individual has written a book in which she claims to show up the evil practices of convent life and to tell the world what wretched sinners are—of which sinful mortals she seems to have been "the chiefest among ten thousand and the one altogether lovely" until as she claims, she was "miraculously converted to Protestantism." Edith has done worse than write a book; she has taken to the rostrum and, with the claptrap of showy posters, an advance agent (who, by the way, is a gentlemanly person with a keen eye for business) and reserved seats, call out a crowd at so much a head, to listen to a rehash of her book which contains at length the recital of her own shame. And, not satisfied with general allusions to so delicate a subject, she must lecture to audiences of ladies only, before whom she enters into a minuteness of detail that is not proper for the promiscuous masculine ear to listen to, and especially if aforesaid ear belongs to one of that modest and naturally retiring class, a public journalist. The writer as an individual, is not much versed in convent life for constitutional reasons; neither is he thoroughly posted in the various religious orders that constitute the working machinery of the Catholic Church; but, after reading the O'Gorman book we should say as a rough guess, that, if she did not, she ought to have belonged to the "order of Magdalens" provided there is any such order.

Notwithstanding the "fair" speaker's "miraculous" conversion to Protestantism, it seems that the miracle did not strike in deeply enough to tone down the personal vanity which she exhibits in her handbills in announcing herself as the "beautiful Miss O'Gorman"—a sort of sop thrown to the sensuous and "unconverted" worldling, to be returned in the shape of staring crowds and overflowing coffers. "Her lecture," she claims "is a narrative, simple and truthful, not of what is occurring in foreign lands or among uncivilized races of men, but of what is taking place here among ourselves, who claim to be enlightened." Anyone who has looked into the sad, plain, spiritual faces of our good Sisters of Notre Dame who devote their lives to the education of the young of their own sex; or of that other order, the Sisters of Mercy who keep watch by the bedside of suffering mortals in our prisons, hospitals and wherever disease and contagion toy with human heart strings—and can say that these women are bad, must possess a very bad heart himself. We are not pretending to contradict the O'Gorman in the matter of her personal experience with a certain priest to whom she attributes her downfall. It may or may not be true. We know there are bad men in all the walks of life, and that priestly robes often conceal a corrupt heart; but that the church should be condemned for the moral delinquencies of an individual member is as unreasonable as it is unjust. The fact is, her book and lectures have too palpable a savor of Mammon about them to conserve the cause of religion or morality to any appreciable extent.

THE FESTIVE TOAD.

Among common reptiles perhaps none is more generally repulsive than the toad. Not endowed with a very large share of personal beauty, when disturbed in his haunts he makes it a point to aggravate his ugliness by swelling himself up and assuming an aspect of general malevolence and meanness of the most unprepossessing character. For these causes his great usefulness and entire harmlessness are generally overlooked, and the poor toad receives numberless unmerited persecutions at the hands of those who should be his protectors and friends. Take, for instance, one of the many gardens of our city. Many an amateur florist has been amazed and surprised at the marvellous disappearance of the seedlings and small plants with which she is stocking her garden. Pansies, pinks, astors, golden seal and numberless other plants just thrusting their green leaves through the soil, suddenly disappear without any apparent cause. All sorts of surmises are indulged in as to this unwelcome abduction. Some one suggests the birds, and screens are arranged to guard against these feathered robbers. "Too hot," says another, and shades are provided. "Need more water," suggests a third, and forthwith the beds are flooded. And so on, with causes surmised and remedies applied but all equally futile. If our fair friends wish to know what becomes of their cherished treasures, let them some warm and moist evening take a light and inspect their flower beds. They will no longer be surprised at what is gone but will wonder that anything remains. All through their beds and over their flowers will be found a hoard of hideous, hungry plunderers. Upon every tender, shrinking plant slimy slugs will be fastened and feasting. Earth worms by the myriad sucking the life from the feeble seedlings; blind worms and sowbugs—all the loathsome things that lurk by day under boards and stones, leaves and holes in the ground, stolid and sullen, come forth with the welcome darkness and hold high carnival amid the florist's treasures. No wonder that under the poisonous touch and ravenous teeth of such a hord our floral weaklings vanish as in a fire. What hope to resist the nocturnal incursions of such a host? In the brown wart-toad the gardener has an ally not to be despised. With the night that calls out these foes for their prey comes forth this brown hunter. Not swollen and sullen as when you disturb him in his chosen retreat. Not moving by awkward leaps as when escaping from an aggressor, he now strides along, the tiger of the creeping things that are about him. Let us watch for a moment his proceedings. A few feet before him a slug with protruding horns and slow but steady movement, is making directly for your flowers. One stride and the toad is within a few inches of the gliding pest; you watch closely to see what will next betide, and lo, the slug has vanished as though he had never been. You rub your eye sand look more closely, but he is not there, and the toad looks as unconcerned as though he had never heard of this or any other slug. On goes the toad, and with curiosity excited you follow his movements. A sowbug is scurrying across his path, and presto, and the bug has vanished. You wonder, for you do not know that the toad has a tongue coiled up like a watch spring in his mouth, with which, and with a swiftness that eludes the eye, he can pick up a slug, a bug or a fly six inches off. And now he comes across an earth-worm and into his larder it goes, by a somewhat different process. Seizing the worm by the end and quite regardless of his writhings and struggles, he tucks him away hand over hand, using his paws as a sailor does his hands when drawing in a rope, and when the end of his worm is reached tucks that down with his toe in the most complacent manner possible and marches on to new conquests. No vegetarian is your toad; no reptile vulture feeding on the dead. His prey must live and move ere he will seize it. Follow him on—no halt, no pause—tireless as death, insatiate as the grave; what he devours seems to provoke, not to satisfy hunger. Look again later. Perhaps in some distant part of your garden you will find your swarthy friend still intent on his fell work; and so till morning light send pursuer and pursued to their dark coverts, without rest or pause goes on the work of destruction. To watch the toad in one of his nocturnal forages is to make you the fast friend forever of this most obtrusive but most vigilant and efficient ally.

A WORD FOR THE BELLS.

Just at present there seems to be quite a general attack against the bells. In the papers and through the courts there is a very general ventilation of individual grievances at the manner in which the studies of some, the slumbers of others and the comfort of all is interfered with by these alleged nuisances. It may be that in some places the ringing of bells is carried to excess, and it may be that under certain circumstances, the sick, the sleepy or the morbidly sensitive and nervous are annoyed and disturbed by the clangor of bells. But so it is with some as to any or all of the sounds and sights which accompany and are a part of civilized life. Still the tides of life must flow on, and when they take the shape of drays, machinery, cries and the din inseparable from crowds and active life, they will not flow noiselessly, and those who cannot endure these sounds or are unable to stifle them, will evidently have to get away from them. So it will probably be with the bells—they might perhaps be dispensed with, so might a great many other things that will not go, and the comfort (or the caprice, if you please) of the many will not be likely to give way to the morbid sensitiveness of the few. It is insisted, however, that in respect to the bells it should, and it is asserted that as timepieces are now in very general use, and as telegraphs may be, and are, successfully employed as fire-alarms, bells are no longer required either for invitation or alarm and should be forthwith transformed into scalding pots and swill kettles. We are by no means certain that either clocks or telegraphs can discharge as fully or as efficiently the services now devolved upon the bells. There is more than a mere indication of time in the ringing at stated intervals of a bell. It addresses itself to another sense and in its ringing notes there is an appeal to duty. Is there no more in the solemn tones of a church bell, suggesting, as it does, all the duties of religious worship than in the indication of the same hour by a three-dollar clock which points to a figure with the same stupid and unmeaning iteration whether it be soup, physic or a walk that is to be taken? In one there is a suggestion of sentiment—loud, earnest and pressing; in the other, the baldest presentation of the most unsuggestive fact in the most prosaic way. Nor is it true that clocks have wholly superseded bells even as an indication of time. In most of the families, workshops and vocations the bell that calls the devout to prayer, is the signal that fixes the hours of labor, of recreation and of rest. It is listened for by hundreds that may not be provided with clocks or who may be at a distance from these chroniclers of time. So also as to fire-alarms. We doubt very much whether any of our citizens would be willing to have these signals of danger dispensed with. To be sure, the telegraph alarm may be quite sufficient for the fire department, but most of our citizens have interests which fire may engender and which are remote either from their places of business or their abodes. We apprehend there are few who, alarmed during the day or aroused at night by the fire-bell, do not look with anxious solicitude for the direction of the fire in order to learn whether their possessions are imperilled, and who, in the event of a general conflagration, would not welcome the warning that called them to the place of danger.

But independent of all these practical results, we think there is far more than all this in the voices of those bells that so many now seem willing and anxious to stifle. For over two thousand years they have been the companions and servants of man. We have taught them a language; we have given them a voice in the deepest, most sacred feelings of our nature. They speak and a host of memories rush unbidden upon us. In the knell of to-day we recall the time, months or years bygone, when to the same sad requiem we laid our own loved dead to rest. With their joyful peals come again the days of our happiness, the hours of our triumph, the seasons of our jubilee. As a quaint old writer makes them say:

> To call the fold to church in time,
> We chime;
> When joy and mirth are on the wings,
> We sing;
> When we lament a departed soul,
> We toll."

Voicing our joy and wailing in our sorrows, the bells have become a part of our better humanity. When they shall be silenced, the voice that for ages has echoed the purest, the loftiest, the holiest sentiments of nature will be forever dumb.

THOUGHT HE KNEW HIM.

They've an absent-minded detective in Hollister. The other day he was sent out to look for a noted monte sharp and was furnished by the sheriff with a photograph of the man he was desired to arrest. While walking down the street he would pull out the "carte" every now and then to make sure he would know his man should he meet him. When opposite Joe Towles's he thought it was near time for his matutinal Tom and Jerry and he wended his way hitherward to quaff. As soon as he entered the saloon he saw a flashily dressed, glass diamonded, big hatted individual whom he fancied he had seen before, he couldn't tell exactly where. The stranger asked him to take a drink; he complied and reciprocated, and, after several rounds, he, of the large diamond, proposed a game of pedro, which the worthy officer agreed to. In the course of an hour the detective had to go home and get some more coin, having sunk all he had brought with him. When he got home he happened accidentally to glance at the photo he had in his vest pocket, when the truth dawned upon him. "I thought I knew him," yelled he, as he ran at full speed towards Towles. But he arrived too late, his friend had just stepped out.

THE AUTOMATIC EAR.

(AN IMAGINARY INTERVIEW WITH EDISON.)

We visited Mr. Edison in his laboratory at Menlo Park a few days ago. This prince of inventors and his surroundings have been too often described to require any repetition; but a forthcoming production that is to excel all his other marvels was exhibited to us and will speedily be presented to an appreciative world. After some desultory conversation upon his mechanical marvels, the Professor remarked, "Many of my productions appear as yet as mere toys and are really nothing more; but in and through them all is the germ of a discovery of incalculable importance. The first notice that was taken of steam was that it raised the lid of a tea kettle, and yet in that lay the germ of a mighty power that to-day rules the mechanical and commercial world. So it is with these discoveries of mine. They are mere germs. It may remain for other men, and perhaps for other ages, to finally develop and utilize them. Take, for instance, the phonograph. It proved that speech was simply a succession of vibrations. From the fact that all articulate sounds can be produced and reproduced by reproducing their vibrations, the proposition easily and certainly follows that all sounds, articulate and vocal, can be not only reproduced but arranged and governed in accordance with recognized laws. In short, not only that all vocal sounds can be reproduced, but any sound within whose range musical notes are found can be so reproduced as to present themselves in harmonious succession, and not only this, but that such mechanical appliances can be constructed that all persons shall not only hear alike but shall appreciate what they hear." We confessed that the subject was too large and too intricate for our comprehension. "Not at all," replied Mr. Edison, "it is its very simplicity that embarrasses you. For instance—" and he set in motion a musical organ in the room—"now," said he, "you perceive the order, that is, the harmony of the notes. Now give your ears a twist or two, that is, change the position of the lines through which these vibrations are communicated by the drum of the ear. You observe that these notes are all broken, interrupted, the key changed, discord where all before was harmony. What does this show? Simply that the saying, 'a musical ear' is a statement of a truth. The drums of all ears are substantially the same, but the forms and shapes of ears are very dissimilar. The mechanical question to be met is to furnish a mechanical ear in which the curves and convolutions shall be constructed on the most exact rules of harmony. The vibrations of music received by such an ear, pass through this elastic tube directly to the drum of the ear and are not in the least affected by the defect or deficiences of the natural organ." "Here you are," said the Professor, and here he produced a semi-transparent instrument, shaped like a human ear, with a small elastic tube attached. "Now insert this in the cavity of one ear and place your hand over the other. Now what do you think of that?" The effect was wonderful. The notes of the organ transmitted to the brain through this singular apparatus were unusually augmented both in volume and melody. In fact, it seemed as though the capacity to comprehend and enjoy was greatly augmented. The Professor evidently enjoyed my amazement. "This invention," said he, "makes it not only certain that all may hear, but that all shall hear alike. The subtler refinements of melody heretofore the delight of the privileged few are now within the reach of all. I have given to humanity a musical ear." We gazed in speechless wonder. "Nor is this all," continued the Professor; "turn from the proposition that all shall hear alike, to the one which provides that they shall hear; the discovery is so simple it can hardly be called a discovery, it suggests itself." We confessed it did not suggest itself to us. "Does not," said the Professor, "I will explain. This musical ear which you see is constructed upon the mechanical principle of mathematical exact melody. A discord or false note could not pass through it, but would be rejected at once, and while you might be conscious from a certain jar that false chords were being sounded, none but notes in perfect harmony would pass through the tube. Now with this property of this automatic ear to reject false notes and transmit nothing but rythmic sounds, it becomes perfectly practicable, by combining with the phonograph, to produce the most perfect, varied and exquisite melodies. All you have to do is to present to the instrument a sufficient number of varied vibrations and it will, so to speak, sort them out and arrange them in the most perfect harmony. It is, in short, in sound what the kaleidoscope is in figures; with a very few fragments of colored glass the latter instrument produces an infinite variety of the most beautiful forms. Upon the same principle the automatic ear, by a slight change in angle, curve or position, will produce an endless variety of melodies.

The Professor marked our look of incredulity. "Seeing is believing," he said; "come with me." He led the way to a building detached from the rest. As we approached a chorus of the most diabolical noises imaginable greeted our ears. We entered and found ourselves in a room or hall which was constructed in a funnel form. At the end where we were standing a variety of machines were grinding out the most hideous sounds, screeches, squeals, howls, and roars that I ever heard. Compared with it Babel was silence itself. At the farther end of the hall an automatic ear, like the one he had shown me but very much larger occupied the entire end of the room; while behind it a phonograph moved by clockwork was quietly recording the vibrations transmitted from the tube of the gigantic ear. A movement of the lever and the phonograph stood still; another, and the hideous sounds ceased with the movement that produced them. After the appalling uproar the silence was absolutely painful.. "Now," said the Professor, "we will see whether the 'harmonic separator' deserves its name." He returned the needle over a portion of the distance traversed, placed an instrument like a trumpet before the phonograph and set it in motion. It was unnecessary to tell me to listen; never had I imagined such melody could be produced. No orchestra however skilful, no master however vigilant, no instrument however perfect yet guided by human hands, could have compared with this wonderful performance. Without a break or repetition the volume of melody rolled on—one majestic cadence of rythm. I was enchanted and astonished. "Will it never cease? Will it never repeat itself?" I asked. "Never," said the Professor, "unless the coincidence should occur that all these clashing sounds and varied vibrations should chance to again recur in the precise order in which they have been presented to the instrument—a possiblity that can only be measured against untold millions. "This," said the Professor solemnly, "is the phonograph in music, mathematical in its perfection, infinite in its variety, eternal in its duration." We left the magician awed, confounded and overwhelmed.

WORRYING POOR HUMANITY.

Everyone is now inclined to be jubilant, and with good reason. Kearneyism has now been crushed out in San Francisco and the citizens of that village are preparing for the greatest business boom ever known in its history, while the people of San Jose will not fail to obtain their share of the good things that are to follow. Besides, we ourselves intend to administer a parting kick to Kearneyism in a few days, which will accelerate its passage into oblivion. A splendid Republican administration is promised for the city, which of itself, is a fair guarantee of prosperity. The certainty of a Republican President of the stalwart sort for the next four years also tends to increase the general hilarity; and when, to all these coming advantages, the blessed rain is added—itself alone worth millions of dollars to the people of California—the prospect can hardly be improved, especially when thanks to the able efforts of the Mercury, the scale-bug is also to be extinguished. This fills the measure of human felicity, and the whole population is ready to join in the general rejoicing. Unfortunately, just as our hopes are at the highest and we are in the full flood of blissful anticipations, some miserable scientist steps forward to rob us of our joy. One Cushing, Ernest Cushing, has published an elaborate paper demonstrating the intimacy of the connection between the sun-spots and the cyclones, epidemics and other calamities and gathers them altogether to be hurled at our devoted heads in the year 1881. And there appears to be no way of evading his conclusions. With all this gloomy cynicism characteristic of his species, he has constructed the most elaborate tables, showing to a mathematical certainty that next year is to be one of the most unhappy in human history. With diabolical persistency he has traced back all the sun-spot cycles which are recorded with any authenticity and has found that they occur at intervals of about eleven and one-half years, and that their appearance is invariably the signal for alarming convulsions of nature, wars, epidemics, suicides, assassinations and all the rest of the horrors that men of his kind are so fond of predicting. And besides his sun-spots, themselves formidable enough, he is preparing a perihelion of the four great planets also for next year so as to complete the devastation begun by the sun-spots. It is a terrible horoscope he has prepared for the year 1881, and all the more appalling because there appears to be no way of averting it. Nor does Mr. Cushing lack confirmation for his gloomy calculations. The fact that sun-spots appear in cycles and that they are coincident with epidemics and magnetic disturbances, have long been known to scientists, and he has only collated and applied the facts discovered by former investigators to his own peculiar theories. And, of course, the theory that any radical and extensive changes in the sun must affect the condition of the earth and its inhabitants, is very plausible. But, admitting it to be true, nothing is to be gained by attempting to frighten people. Epidemics will come if the conditions are right for them, but it is the part of scientists rather to point out how they may be averted or modified than to magnify the danger. In 1881, as in all years that have preceded it, bad drainage, poor food and intemperate habits will tend to breed epidemics, and strict attention to sanitary regulations will tend to avert them. The wise will therefore set his house and his body in order and, equal to either fortune, calmly await the result.

OUR INCENDIARIES.

"Undoubtedly the work of an incendiary," is the conclusion of the report of about half the fires that occur in our community. That there are fires, perhaps many kindled by the malicious and evil-disposed, we do not doubt, and that every fire of which an immediate and apparent cause cannot be assigned should be accredited to the same malign influence, is quite natural. This, as an explanation, may not only whitewash many an act of negligence of which the owner is alone cognizant, but is doubtless often resorted to as an explanation of fires by which an over-insured owner is not the sufferer. These, as causes of dishonest fires, are not questions upon which we propose to now speak, but we wish to call attention to a condition of things present in almost every house and which we have no doubt is the prolific cause of very many so-called mysterious fires. We refer to the disposition made of ashes—the manner in which they are placed in barrels, boxes, wooden receptacles of every kind, or heaped up against a fence or an outbuilding, the owner directing and therefore assuming that if a live coal chances to be in the ashes that this coal enveloped in dead ashes cannot possibly lead to harm. A friend gave us his experience with these dead ashes, and discloses a very singular and very active source of danger in them. He says that several years ago he constructed an ash-bin. As the building in which it was placed adjoined his dwelling he took every precaution to make it fireproof, and with bricks and mortar and a metal cover has no doubt accomplished this result. In keeping the ashes in a bin, a very singular fact has been disclosed; each year when the bin is half full the ashes take fire, probably from some smouldering ember, and the entire mass burns through from top to bottom—precisely as so much coal-dust that had never been ignited would. As the cover admits but little air this combustion goes on very slowly, always occupying a number of days and sometimes as long as two weeks. At any time while this combustion is in progress, a shovel thrust into the ashes will expose one mass of fire in which the ashes are in no way distinguishable from the cinders, and leaving no room to doubt that they will still retain combustible properties in a very marked degree. After the fire has passed through these ashes they present a very different appearance from before; the former bluish cast being changed to a greyish white, much like ashes found in corners of grates and stoves where their situation has caused them to be repeatedly subjected to a high degree of heat. When the bin was cleaned out after such burning it was found that not a particle of cinder, coal or anything combustible was to be found. That tin cans had their tinning as well as solder all melted off and that fragments of glass or crockery were warped and distorted in such a way as to show the very severe heat to which they had been subjected. Having passed through this second burning the ashes lose all their quality and cannot be ignited. This was not an exceptional or isolated instance, but has been the observation with precisely the same result of every year since this has been in use.

These observations of one household should be carried into all the houses, offices and rooms in the country where ashes are placed, not only in fire-proof receptacles, but more particularly in buckets, boxes and barrels standing in outhouses in forgotten corners and covered with all sorts of combustible trash. In a small proportion of these fire has no doubt been smouldering for days or weeks, and some gusty, windy night a flame is fanned into sudden life. If seen in time, we hear that the alarm was caused by ashes in a wooden box taking fire. When discovered too late, we learn after perhaps a destructive conflagration, that this must have been the work of an incendiary, "as there had been no fire used about the place for several days."

This article is written to call the attention of all to the importance of a fire receptacle for ashes, and thus end the career of what we believe to be a very frequent, as well as formidable, domestic incendiary.

LONGER LIFE.

French physicians are always making "discoveries." One of them has collected figures to prove that the average duration of life has increased several years during the last century. He surely did not go back very far or he would not dare to make such an assertion. True, we have quite a number of centenarians now living, but they are living not with the present, but in the past; they have lived so slow that they are fifty years behind the generation, and this is why they have lived so long. To keep up with the time in a worldly sense, is to live fast and in a state of perpetual excitement and mental nervous strain, the result of which the crowded insane asylums of the world painfully illustrate. If there is any increased length of life over that of a hundred years ago, it is among persons who do not live but vegetate. People do not "rust out" as soon as they wear out, unless they regulate their lives with that mechanical exactness that mainly distinguishes man from the machine-reason, which all do not manifest, being omitted from the question. The story is that man was started out in the beginning for a nine hundred or a thousand years' sojourn on earth, and what was to hinder him? What did he know to excite or torment him? Steamboats, railroads, telephones, telegraphs, steam-engines and the thousand and nine hundred other inventions, improvements and conveniences he knew not. And he never heard the word "evolution" that embodies them all and any and everything else that is to come even to the end of time. Whether his tenure of life was shortened to curtail his growth in sin, or the plan was found to be an injustice to the rising generation around him, none may say. Longer life than is given man to-day would be a blessing only on conditions of increased powers of usefulness and a vigorous end. To prolong the decrepitude and decay of age would be punishment. Otherwise it is to be hoped the French physician is a fraud.

"ACROSS LOTS TO GLORY."

The piety, assumed or real, of murderers about to be hanged has long since become proverbial. Charles Lee, who was hanged recently at Richmond, Va., for the murder of Daniel Miller, was unusually pious. But by all odds the most cheerful and hopeful murderess we have had the pleasure of noting is Barbara Miller, his accomplice, who is to be hanged in September, and who bids fair to rival all murderers in point of piety on the gallows. While Lee expressed himself as ready to go and confident of salvation, she was so anxious for future bliss that she requested the sheriff to hang her a day ahead of Lee, so that she might "beat him in the race to heaven." Such a faith is a fit subject for envy by the rest of us toiling saints (including the publishers of the *City Item* and *Pathfinder*) who are struggling with the world, the flesh and the devil, but who expect to enter in only by "the skin of their teeth." The people who are fortunate enough to be hanged get a decided start in the race for heaven over good, honest people who acquire their faith in the ordinary way.

SARGENT vs. BISMARK.

We see that certain newspapers, notably those either hostile to Mr. Sargent or those disposed to be especially subservient to Bismark, are suggesting the necessity or propriety of our Government withdrawing Mr. Sargent from Berlin; these papers assuming that in the unfriendly personal relations supposed to exist between our Minister and the German Chancellor a sufficient cause exists for his withdrawal. We fail to see either the necessity, propriety or even decency of the proposed action upon the part of the Government. That an ambassador is distasteful to the court to which he is regularly accredited may be sufficient cause for his recall, but the same would depend upon considerations to be estimated as well by the Government which sends, as by that which receives him.

If these are considerations which affect his future relations with the nation to which he is delegated, or involving his own moral character or capacity, it might doubtless justify his prompt recall with or without special objection. None of these, we understand, characterize Mr. Sargent's position. He has been at all times an enthusiastic admirer of the German character, and has always had his warmest admirers and staunchest political supporters among that nationality, while his moral character has been at all times beyond either cavil or criticism. Not even a plausible pretext can be suggested by Bismark for Mr. Sargent's dismissal, and no decent reason can be given by our Government for his recall. The reason, and concededly the only one that is even suggested, is that his zeal for American interests and his earnest advocacy of the matters he was appointed to represent and defend, has given umbrage to Bismark. That Sargent has not contented himself with a mere prefunctory presentation of a diluted mass of diplomatic twaddle, but has shown the substantial reasons for the position he has taken, is indeed true. He has had the courage to show that Bismark's position is the veriest pretence and humbug. This is understood to be the full extent of Minister Sargent's offending. He has had opinions of his own, and has neither abandoned them nor kept silence upon them at the dictation of the German Chancellor. The fact is, that Bismark has had his way so long that he expects everybody to sneeze when he takes snuff, and gets duly indignant when they do not. To now recall Sargent simply because he has done what was right and what all our people approve him for doing, is not simply to sacrifice an upright and fearless Minister; it is to add to the credentials of our representatives abroad that they are in all respects to conform to the wishes of those to whom they are sent, regardless of the wishes of those who sent them. It is to inform Bismark and those of his ilk, that whenever our representatives attempt to assert the dignity of the fifty millions of people they are to represent, or their own manhood and independence, they can kick them out, and that we will help them to do it. We shall be slow to believe that the United States is prepared to accept any dishonorable position. The fact is, all we would accomplish by recalling Sargent would be to abase ourselves before the world, and particularly in the eyes of Germans and Germany. Bismark is the incarnate representative of absolutism in Europe—of the divine right of kings. The existence of a republic anywhere is revolting to him and the great Republic of the West is not only a standing refutation of the principles of his policy, but she is each year receiving thousands of her most valued citizens from the German Empire, and these in their turn are teaching monarchial Europe lessons of Republicanism and self-government that Bismark cannot reply to or refute. Bismark's quarrel is not with Sargent. It is with the great Republic that Sargent represents. Whoever may be appointed to represent it who shall dare to stand boldly and fearlessly for it, will meet the same treatment Sargent is receiving—insults Bismark means them for; honors they should be considered by the nation for whom they are really intended. By all means keep Sargent at Berlin.

TEACHING WITH FIRE.

All history teaches that accidents, war, pestilence, famine, fire, disease, tyranny and death in their most terrible and revolting forms, have proved invaluable agents in working out the destiny of mankind. To some of the most terrible occurrences on record we owe the price of many of the dearest rights that we enjoy. Reforms that have brought untold blessings to the race have forced themselves into notice and adoption through the means of the most frightful disasters. The world seems to wait for a thunderbolt from the right hand of Jove to signal it on to higher achievements. It took a fire, terrible and devastating in its results, to widen the streets of London; plague upon plague, sweeping her people away by thousands, to teach the King and Parliament the necessity of sanitary measures to protect human life. So has history repeated the same sad lessons from the beginning of the world unto this day. Those who have visited the cities of Europe or have read the accounts of intelligent travellers giving the details of the habits and customs of their inhabitants, their manner of living, the architecture of the tenement houses or family flats, and the inconveniences and dangers that surround those who live within their walls, will at once understand why it has taken the terrors of a Vienna disaster to teach the rulers of that city lessons of architecture, and call their attention to the inefficiency of the fire department. Outside of a few of the larger cities our little town has a fire department a century in advance of the cart-and-barrel brigades of the proudest cities on the continent. The thousand lives lost in the Ring theatre were demanded as the price of a needed reform. As our own Brooklyn theatre disaster widened all the doors of our theatres and public halls, cut windows and doors and forced the adoption of laws to protect public assemblies from the dangers of crowded aisles and insufficient means of escape, so will the disaster that has come upon the people of Vienna work lasting reforms that will prove of incalculable benefit to those whom the unforeseen forces of the world have taught a terrible lesson.

SIMPLICITY INTENSIFIED.

A scientific Michigander has at last solved the Chinese riddle. He has probably never seen a Chinaman, but he can tell us more about him in a minute than we have learned in all our twenty years experience with this festive pagan. His method is certainly very simple if not wholly original. It is this: "There is but one practical course for this nation to pursue, and that is to meet this great influx of population as they land on our shores with the spelling-book in one hand and the Bible in the other and teach them to become God-fearing and law-abiding citizens." John will take to your spelling-book, for he is eager to learn your language. It is thus he becomes a more valuable machine. He will also accept your Bible if thereby he thinks he can please you. Indeed, so accommodating is he in such matters that he will accept anything in the way of opinion, no matter how knotty or how little understood, so long as he can make it pay. There is one phase of this Chinese question that our eastern neighbors seem never to be able to comprehend, and that is that the Chinese immigrant is wholly unlike all others. The European immigrant brings his wife and children with him. He is of similar race and readily assimilates with our people. He comes to stay. The Chinaman has no family; or if he has, he leaves them behind. While the adult white male immigrant represents some four or five persons who are dependant upon him for support, the Chinaman represents only himself. For this reason, if for no other, he can underwork the white laborer. He comes with no intention of remaining, but only for the purpose of making what would be regarded as a competency in his own land and then returning to enjoy it. He is not even content to leave his bones here; but they are faithfully gathered together and shipped back to his native land. As to the Chinaman becoming christianized to any considerable extent, that is a moral impossibility. He knows that his civilization is vastly older than yours, and he believes that his religion is far better. He regards you as a barbarian at best, and he wants nothing of you but your money. He cares nothing for your laws nor your Bible. He is wedded to the past—belongs to an arrested civilization, and you can no more change him than you can change the procession of the equinoxes.

Eastern people who favor the Chinese immigration simply don't know what they are doing. If there was any division of public sentiment on the question here they might be excused for taking sides in the matter. But there is not. Our people who are brought face to face with this evil, and who have studied it long and carefully, are a unit in the matter; and surely this unanimity ought to have some weight with them. But it does not seem to. They measure the Chinaman by the white man's rule and therein they are greatly deceived. But they know no better.

SIR MOSES MONTEFIORE.

The approach of the one hundredth anniversary of the birth of the illustrious philanthropist, Sir Moses Montefiore, calls for more than a passing notice. The name of this individual, distinguished even more by his eminent virtues than by his venerable years, has long since passed into a household word throughout the world. A man of great ability and possessed of abundant wealth, Sir Moses Montefiore has for three-quarters of a century devoted himself to works of philanthropy—protecting the helpless, aiding the distressed, and especially directing his efforts to the amelioration of his Hebrew brethren throughout the world. The earnest efforts, the untiring zeal and the lofty spirit that characterized these endeavors have long since placed him at the very head of living philanthropists, and given him an influence with the English people that can hardly be estimated. No case of outrage or brutal oppression against a Hebrew, however humble his station, or distant his abode, could come to his knowledge that it did not find prompt attention; and his influence with the English authorities was such as to evoke a swift and effective remonstrance upon the part of the British Government, whether the party to whom it was addressed was Russian Czar, Persian Shah, or Ashantee Chieftain. And this has been the mission of this long and honored life. No wonder that his Hebrew brethren throughout the world everywhere and with profound veneration, are observing this epoch in this great career. There is no clime, no land, no community that has not felt his protection or shared his bounty, and none that can be silent when this name is to be honored. Nor should this recognition be confined to our Hebrew citizens alone. The charity and watchful care of this man did not confine itself to his own race, nor was it limited to class or bounded by country. It was as broad—as cosmopolitan as humanity. Foremost as the champion of his own persecuted people, he was with the first in every good work and wherever protection was to be afforded or suffering alleviated, and probably no man within the century has exerted the same moral influence for the universal good than has this distinguished Israelite. The great career thus wonderfully prolonged, is now drawing to a close, and with a record of usefulness and pæans of laudation vouchsafed to but few, the name of Sir Moses Montefiore must pass into history. In this purpose of his people that he shall, while living, behold this universal recognition of his prominent worth, we heartily sympathize. In it we would gladly see all our citizens share.

MOBS IN COURT.

We recently called attention to the frequent acts of violence committed by lawless men and sought to be excused under the appellation of "Mob Law." It is not, however, in these outrages inflicted directly by the hands of such mobs, that the only, or perhaps principal mischief is wrought. The same spirit is too often exhibited in Courts, and through the community for the purpose of intimidating judges or influencing juries. It seeks in the shape of so-called "public opinion"—often created for their special object and by the use of public clamor, to accomplish a result which it well knows cannot be attained if established rules and deliberate, impartial judgment are given their proper effect. It is thus more demoralizing—more pernicious in its consequences, than when it exhibits itself in the physical violence of a mob.

In the latter case the law is indeed violated and defied, but its infractors may be held accountable to it. In the former it is the law itself that is perverted in its own tribunals—the very fountains of justice—that are polluted and poisoned.

The case of young Nutt, now on trial at Pittsburg, Penn., is an illustration of this. The circumstances of this case, as we now recall them, are these :

A man named Dukes was waiting upon a Miss Nutt, presumably contemplating marriage. He suddenly discontinued his affections, and was called to account by her father for so doing. In answer to a written demand for explanation Dukes replied by statements calling in question the chastity and character of the lady and assigning this as the excuse for his action. The father armed himself, repaired to the office of Dukes and attempted to kill him.

Dukes did not submit quietly to the proposed slaughter, but made the best resistance he could, and Nutt, the assailant, was himself slain. Dukes was tried for murder, and these facts, being shown in a community entirely in sympathy with Nutt, Dukes was acquitted.

The jury could have done nothing else ; and it would have been an outrage had they attempted to. Dukes had not forfeited his life to Nutt, even had his statement as to the daughter been wholly false. If it were true, or if he believed it to be true, it was good reason for his discontinuing his intimacy with her, and the father could not well complain when Dukes gave the explanation he so imperiously demanded ; and certainly he had not forfeited his right of self-defence by any or all of these actions and declarations, well or illy though they may have been founded. So said the jury, and for so saying, as under their oaths they were bound to say, they were most unsparingly denounced by the community. After his acquittal Dukes resumed in the same community his former avocation. Threats were, however, constantly made that the son of Nutt, a young man of about twenty, proposed avenging his father's death ; and young Nutt did, with every advantage to himself that he could anticipate and provide for, assassinate Dukes. For this he is now going through the form of a trial. The result can be forecast with the same certainty that in a few days it will be announced. The same mob spirit that denounced the Dukes jury is present and controlling in the court room in the Nutt trial. The same stuff that we heard in the Sickles and the Cole trials years ago about emotional insanity, and that has been reported *ad nauseum* ever since, is being foisted upon the present jury.

A mob of claquers is in attendance to influence the jury by exhibiting every presumable and possible mode of approval or disapproval of their sympathy with the prisoner. There will be a gushing, effusive speech by a spread-eagle counselor ; fainting women, sobbing spectators, a sympathetic jury, and then a verdict of acquittal ; a wild hurrah by the court room mob ; another scene by the relatives and friends of the defendant. The telegraph will announce and the press blazen forth that this result, outrageous in itself, and secured by the most outrageous means, is fully approved, and so for that a special case will end that particular chapter. But the lesson they read will be remembered ; will be remembered by a community thus instructed that murder can take such forms that it sanctifies rather than stains ; remembered by juries, taught that they must watch for the clamor, and respond to the echoes of the mob, and not to the dictates of conscience or the alienations of duty if they would live in peace. For no end of evil, no measure of mischief does the lesson remain—verdicts thus attained, laws thus administered, justice thus mocked becomes but a travesty and a farce ; a burlesque comedy, were it not that the characters are written in blood ; that murdered men stalk through every scene ; that perverted law and outraged justice is the principal taught and the moral inculcated ; and a debauched and a demoralized community, a depraved public sentiment is represented by the audience which applauds.

Pittsburg is not alone in these exhibitions. In the Cox-McLaughlin affair, San Francisco has attended one of these side-splitting comedies. The Coroner's jury and the committing magistrate have already retired amid the rapturous applause of the tickled spectators ; and the Grand Jury will soon conclude this exquisite burlesque with the facetious announcement that McLaughlin came to his death by recklessly rushing backward upon a peaceable bullet, which was quietly endeavoring to make its way from Cox's pistol to the door, and that McLaughlin was alone to blame for the consequence of this act of rashness and folly. How long this is to go on, how often these farces are to be repeated we do not know. We are weary of them. Let the curtain fall ! even though it rings down upon the juries a mockery, the Courts a farce, the law a delusion, and society a fraud and a failure.

NO TURKEY IN THE CODE.

Not a thousand miles from Hollister abides a worthy Justice of the Peace, one of the cardinal articles of whose creed is, that whatever is or ought to be, is in the code.

A citizen whose crops had been destroyed by a neighbor's turkeys recently brought suit in his court for the injury sustained. When the case came on for trial both parties were represented by imported counsel, and the trial proceeded according to form. The plaintiff proved conduct on the part of the turkeys that was simply diabolical. He showed that the grasshoppers of Iowa and the frogs of Egypt were moderate and abstemious compared with these bipeds; that they ate more than they could hold, and what they could not hold they would bite off, and what they could not bite off they would tread down. Sherman's march through Georgia was beneficial to the country compared with the daily incursion of these turkeys into the plaintiff's wheat and beets and cabbages. He proved his crops damaged about $500 worth and himself broken-hearted; but with the magnanimous proposition that it was "the principle he was after," he proposed to remit all but $300, and then overcome by this exhibition of the sufferings and the liberality of his client, the attorney for the plaintiff rested. Then rose the lawyer for the defendant with a look of sovereign contempt for his antagonist and of supreme confidence in the court. He remarked that of course His Honor had long since anticipated the motion he was about to make, and which must dispose of the case. That the action was about turkeys, and that while the code did speak of horses and cattle and sheep and swine and mallard ducks and asses, nowhere in that valuable compilation, original, amended or annotated, was the word "turkey" to be found. That while these birds might possess an imperfect natural existence, they had no being in the law, and no court could, under the code, take notice that such creature did or could exist. He concluded, and His Honor referred to his ready code. Down the index went his finger, but it found no "turkey," and, turning to plaintiff's attorney, he inquired if he had anything to say. "Anything to say?" said the lawyer, "I should think I did have something to say;" and he sailed in with bursts of oratory, flights of eloquence, resistless logic and withering sarcasm. He denounced the conduct of defendant's turkeys, of defendant's lawyer, and of defendant himself. But ever and anon as he paused for breath or to gather himself for some loftier flight, would be heard the solemn voice of the Justice: "Show me turkey in the code, I see no turkey in the code." And he didn't find a turkey there, and the plaintiff went out of court by reason thereof; and the chap that drove the plaintiff's attorney back to Hollister says that during the ride back the attorney did express his mind in a way never before heard outside of Plymouth Church, and all this because three sets of codifiers have not put "turkey" in the code.

CHAPTER VI.

THE following pages contain a collection of charges, sentences and decisions delivered during the last sixteen years of his service on the Superior Court Bench. The series is by no means complete, as a large amount of material of undoubted value and interest is not at present obtainable.

In this department of research and knowledge Judge Belden occupied by general consent a position among the first. His utterances were models of clearness and elegance and manifested a legal acumen, power of analysis and versatility of talent equalled by very few at the present time.

The graphic delineation of facts and situations and the eloquence with which the evidence is presented render many of his decisions of no little interest even to the non-professional reader.

ADAMS DIVORCE CASE.

DECISION RENDERED IN JUNE, 1872.

Application by defendant for counsel fees to be paid by plaintiff.

This action is brought by plaintiff to procure a divorce from defendant on the ground of adultery. Answer,—a general denial with a cross-complaint.

In this case, it appears that, as adjunct to the action for divorce, a vast amount of complicated property transactions, affecting most of the property, jointly and severally, of both parties is involved.

For the necessary services of a competent attorney to take charge of this case, through all its branches, it is shown that from $1,000 to $1,500 will be a reasonable counsel fee, and it is claimed that defendant has no available means to be employed in her defence to this action. Upon the other hand, it is shown, that defendant owns a lot or two in the suburbs of San Francisco; that she has secured possession of the homestead heretofore occupied by the family; is in receipt of $50 per month temporary alimony, and that the revenue of plaintiff's property does not equal his expenditures and interest that stands as a charge against his estate.

The question of present revenue may be properly considered upon an application for alimony; plaintiff's income may furnish the measure of defendant's monthly allowance. His property, productive or otherwise, must furnish the means for her defence in the suit. Nor do I attach any special importance to the fact that the defendant is the owner of some lots of land of small value. That value might not be readily or easily realized, and meanwhile the defendant's rights might be severely impaired by reason of the needed means to properly prepare and present her case. It is her right to have the means promptly and readily at hand, and not to be dependant upon the tardy and doubtful revenues that may be derived from possible but uncertain sources. Nor does the fact that the community property has been involved in a network of complications diminish the duty of plaintiff to supply these means or impair the capacity of the Court to compel this judgment. So far as these parties are concerned, the Court will see that the property thus immeshed furnishes the immediate allowance ordered, and will leave to the ultimate disposition of the case the equitable adjustment of the parties' respective rights.

What the allowance shall be is dependent upon many circumstances. In my opinion, this should be confined to a counsel fee reasonably proportioned to the services in the divorce suit proper, without reference to the property question that may never be considered in this action. It should be such as will enable the defendant to employ competent attorneys and pay the reasonable and usual compensation allowed for services of this character. It is also proper for the Court to consider the position in which defeat will place the defendant in the action, not merely the loss of marital position, but social disgrace and ostracism must attach to her if plaintiff's case is established. With all that a respectable woman can prize involved in this contest, she should have the means of making her defence thorough and efficient; and, while the plaintiff is prosecuting against his wife an action that may bring upon her lasting shame and disgrace, he will not be permitted upon any consideration of mere economy, to withhold the means that may be requisite to the establishment of the truth or the vindication of the defendant's character.

The allowance made will be increased, should, in the opinion of the Court, further developments in the case justify such action.

It is ordered that the plaintiff herein, D. T. Adams, pay to F. E. Spencer, attorney for the defendant, within ten days from the service of this order, the sum of $300 in gold coin.

GARCIA CASE.

DECISION RENDERED IN JANUARY, 1873.

[Francisco Garcia was indicted for murder in 1856. He fled the country and was not arrested until 1872, sixteen years afterwards. On being arraigned, he made the motion, the ruling on which is given below.]

A Grand Jury was regularly impanelled in Santa Clara County in the year 1856, before which the case of Francisco Garcia, charged with murder in the killing of an Indian named Juan, was duly presented; and thereafter, on the 16th day of July, 1856, this Grand Jury regularly returned into the Court of Sessions of said County, an indictment against said Garcia, indorsed a "True Bill," and formally indicting said Garcia for said offence. Thereafter, by order of the Court of Sessions of said County, this indictment was regularly certified and transferred to the District Court of the Third Judicial District, County of Santa Clara, for trial therein. At the time of the impanelling of said Grand Jury and of the finding, filing and certifying of said indictment, the defendant, Garcia, had not appeared before said Grand Jury, had not been held to answer upon said charge and was not in custody. He has, within the last few months, for the first time, been apprehended upon said charge, and is now brought for arraignment before this Court, and he now moves the Court to quash this indictment for, among other reasons assigned, that members of the Grand Jury, duly impanelled and sworn as such, and who participated in the finding of this indictment, had, before their impanellment, formed and expressed a decided opinion that the defendant was guilty of the offence charged.

Upon this point a number of the members of the Grand Jury have been called and examined, among them John Murphy. Mr. Murphy's testimony is that he heard the statement of the homicide charged against the defendant from the principal witness, Flores, who claimed to have been an eye-witness to it; that he accompanied Flores before the Mayor of the city, Mr. Houghton, for the purpose of making this statement and procuring a warrant for the apprehension of defendant; that he heard the sworn statement made by Flores before Houghton; that after hearing this statement he believed the defendant guilty of the offence charged, and as detailed by Flores, and has ever since been of this opinion; that after hearing this statement and forming this opinion, he was summoned as a Grand Juror and was upon the Grand Jury that framed the present indictment; that he was present and participated in their deliberations upon this bill, and voted upon it when the vote was taken in the Grand Jury Room.

This is the substance of Murphy's statement, and it is in no way contradicted.

The statute provides that a person held to answer before a Grand Jury may interpose certain objections to the members of such Grand Jury; among others, "That the Grand Juror has formed or expressed a decided opinion that the defendant is guilty of the offence for which he is held to answer;" and it further provides, "That if a challenge to an individual grand juror be allowed, he shall not be present nor take part in the consideration of the charge in question, or the deliberation of the Grand Jury thereon." The statute further provides, "That the indictment shall be set aside by the Court in which the defendant is arraigned, and upon his motion in either of the following cases," enumerating several, and among others provides, "That when the defendant had not been held to answer before the finding of the indictment, he may move to set it aside on any ground which would have been good ground for challenge either to the panel or to an individual grand juror."

Applying these sections to the facts of this case and there would seem to be but one conclusion. The decided opinion expressed by John Murphy would have been good ground for challenge, and to have disallowed the challenge would have been an error correctable only in one form—by setting aside the indictment that Murphy was disqualified from finding.

The statute declares, in terms, that the same course may be pursued, and with the same effect, upon arraignment, when a party had not an opportunity to appear before the Grand Jury; permits him at this stage of the proceedings to move to set aside the indictment and upon the same grounds that could have been assigned had he been in person before the Grand Jury. To hold that he cannot do this, that upon the proof of such a fact as appears here the indictment can stand, makes of Chapter IV. of the Criminal Practice Act, a dead letter.

The Supreme Court of this State has considered several cases involving this question, and although in most, if not all of the cases, it was held that the motion came too late, being made after plea or demurrer, yet the fact that the Court considered the right one that had been waived was certainly a tacit recognition of the fact that, but for the waiver, the right might have been successfully maintained to quash the indictment.

In the present case, the first motion on part of the defendant is to dismiss upon this ground. Independent of these decisions it is impossible to avoid the plain reading of the statute itself.

If a party can be required to answer for his life to an indictment found by one man who had prejudged his case, he can be compelled to answer when the entire panel have done so. If the showing that one participant with the Grand Jury has expressed the most positive conviction of his guilt, ou the most malignant hostility towards him, will not vitiate the indictment thus found, how many incompetent men must act in the matter to taint fatally their work; or why might it not stand though all were thus prejudiced? There can be no rule capable of application save the one prescribed by the plain letter of law—that the citizen's case shall not have been prejudged by any whose voices or votes can put him in jeopardy of life or liberty.

Such being my view of the law of this case, it follows that the indictment in this cause found and filed, and upon which defendant is now arraigned, must be set aside and it is so ordered.

It is further ordered that the defendants case be re-submitted to the next Grand Jury of the County of Santa Clara, and that meanwhile, and until further order of the court made herein, he do remain in custody of the sheriff of Santa Clara County, without bail.

BIRD vs. MALECH.

OPINION FILED IN MARCH, 1873.

By the findings in this case filed, the following state of facts is shown: That the plaintiffs were the joint owners of a tract which they desired to lay off into building lots, and desired a public road laid off through this tract and through adjacent lands in furtherance of this object. That, to accomplish this, they signed themselves and induced others to sign a petition to the Board of Supervisors requesting that the road they desired might be opened. That, while the matter was before the Board of Supervisors, they were active in endeavoring to secure favorable action upon their petition, and also in anticipation and perventing opposition to the proposed road from other parties, agreeing with General Naglee that if he would refrain from his proposed opposition, plaintiffs would give him a road over lands of plaintiffs to certain lands of Naglee, and General Naglee was induced thereby to withdraw his opposition to this road. That, when the order was made by the Board, declaring this a public road, and work was commenced upon it by defendant, as road-master, they made no objection but expressed their satisfaction at the progress and character of the work, and permitted defendant to expend upon that portion of the road passing over plaintiff's lands about $300, without making any objection whatever, and while defendant was expending about $400, in grading and gravelling this road over lands of adjacent owners, plaintiffs in no wise intimated or pretended that they proposed in any way interfering with the opening or use of this road as a public highway. That, after the acts of the Board of Supervisors in declaring this line of road a public highway, the plaintiffs presented a petition asking the Board to designate the proposed road as a "public road," upon which trees ought to be planted under the provisions of the Act of the Legislature of 1868, and procured the passage of such an order, thus enabling plaintiffs to plant trees on each side of said road, and at the end of four years to receive from the County of Santa Clara one dollar for each of such trees then growing. That, after these acts and expenditures, claiming to be dissatisfied with the amount of gravel placed upon said road by defendant, and insisting that more should be used, they fenced across the road so as to wholly prevent its use by the the public, and when the road-master removed the fence to enable the public to use the road its money had built, proceeded against him for trespass, and also sought to obtain a perpetual injunction against his further interfering with this fence or opening this road. In support of this attempt they now object that the proceedings of the Board of Supervisors declaring this a public road, were void because one Mrs. Coe, across whose land this road passes, did not sign this petition, although her husband, who controls and manages her estate, did sign it, and it was admitted that both Mrs.Coe and her husband fully agree to, consent and desire that the road shall be opened, and although it appears that plaintiffs when urging the opening of this road before the Board of Supervisors knew that Mrs. Coe was the owner of this land, and that she had not signed this petition.

I do not propose to go into the question as to whether the Code has abrogated the Santa Clara road law; nor do I propose discussing the question whether the action of the Board of Supervisors constituted a legal dedication of this road, or the conduct of the plaintiffs was a dedication in fact.

I know no reason why a married woman may not by act or acquiescence dedicate a road to public uses over her separate estate. If this can be done, the admission in this case is full that Mrs. Coe so did. But if this is not so I think the plaintiffs are estopped to question the force and validity of proceedings they have been thus instrumental in bringing about. To hold that a party can petition a Board of public officers to do the very act of which he afterwards complains, prevent by personal concessions, legitimate opposition to his proposed scheme, induce his neighbors and adjacent proprietors to unite with him and give the right of way over their respective lands, stand by and without objection see hundreds of dollars of the public money expended upon the line of the proposed road upon his own land, create a charge against the County for trees grown upon the line of the conceded road as being a public highway, and then, when the public seek to use the road built with their money and at his request, that he can exclude them at pleasure, mulct the road-master in damages for attempting to open the road he has built, and enjoin all from entering upon it; if under such circumstances, such an action can be maintained or such a proceeding upheld, it is certainly by no rule of justice or equity. Prayer for an injunction denied and judgment for defendant for his costs.

SENTENCE OF GRANVILLE MILLSAPP.

DELIVERED IN NOVEMBER, 1873.

In pronouncing the judgment of the Court, Millsapp, it is not the wish of the Court to make one single suggestion that shall add to the pain of your present unfortunate position; but in pronouncing this judgment, it is proper, perhaps, that the Court should briefly refer to the case as it was presented, not merely in justification of the verdict of the jury, but also of the sentence which the law charges me in pronouncing. The facts are, that Vicente Corotea was in your saloon and while there became partially intoxicated; that some quarrel or dispute arose about a small piece of coin. You caused his arrest; he was taken before a magistrate and was acquitted of this charge. He returned to your saloon, called for a bundle which he had left there; some dispute ensued between you and him and you fired two shots from a pistol, one of which took effect in his breast and the other in the back of his head, either of which would have been fatal—the two shots within a few moments of each other. Your own version of the case was that you intended to fire but one, but that he came back making threats and demonstrations as though about to make an assault. You further prove that while in liquor the deceased was quarrelsome, but that while sober he was a quiet and peaceable man. You further attempt to show to the jury that at the time he was attempting an assault upon you; that some time before he had made an assault upon you and had attempted to take your life, and at the time you had not intended to fire the shot which he received. It is sufficient, perhaps, for me to say that the jury very properly disregarded two of these propositions: the one that you did not intend to fire but one shot; the one intended and the other not intended. The one intended discharge was sufficient. I think the jury acted well in disregarding your explanation of that. The statement that the deceased had, before that time, made an assault upon you and threatened your life was improbable and unreasonable, and the jury acted well in disregarding it. I may say that your own testimony in regard to the quarrel when you returned to the saloon, shows but trifling provocation, while the testimony of other witnesses for the prosecution shows none whatever. Upon this state of facts you have no cause to complain of the verdict of the jury. If the man was quarrelsome when drunk, your action contributed very largely to bring him into this condition, and you should have been lenient, forbearing and merciful to the man rather than resentful. You were neither. You were as prompt to resent and as quick to slay as though you yourself were guiltless. In this case the law gives the Court a wide range in the exercise of its judgment. Were I, perhaps, to apportion this penalty to your own demerits, it would leave but little of your natural life to repentance or for the society of men. But I am disposed to exercise this discretion on the side of mercy. The sentence of the Court is that you be imprisoned in the State Prison for the term of fifteen years.

PARKER vs. COTTRELL.

OPINION DELIVERED IN NOVEMBER, 1873.

Two propositions are relied upon by plaintiff to establish for his watch the statutory exemption for which he contends.

First.—That the watch in question is part of the necessary implements by which he prosecutes his profession, that of a Civil Engineer or Surveyor.

Second.—That it is part of plaintiff's wearing apparel. To the first position assumed it may be replied that this watch is not, from its character, in any way adapted to Civil Engineering. It is not sufficiently perfect or accurate to be available for astronomical observations, or for correcting bearings, or in any way ascertaining position or place in a survey. The plaintiff himself testifies that he only employs this watch for the same purpose and to the same extent that watches are usually employed by the general community. If this watch is exempt upon the first ground urged, then every watch used as a convenience must be entitled to the same exemption. The fact urged that watches are in almost universal use, and that the present usages of society require an accurate knowledge of time in order to conform to public conveyances and the usages of business, will address themselves with force to the Legislature as furnishing good reason why watches should be added to the list of articles now exempted, and doubtless the same liberal spirit that now exempts wash-tubs, the luxury of the few, with pianos, the necessity of the many, will promptly place the watches and jewelry, indispensable to the comfort and happiness of the possessors, upon the same footing with the shovel of the laborer and the tools of the mechanic.

In this, however, the Court must wait the action of the law-making power and cannot, upon the specious plea of necessity or universal custom, add to the enumerated list of legislative exemptions.

Does a watch come under the second exemption claimed, and can it be classed by any reasonable rule of construction, as wearing apparel? There are decisions that seem to hold that statutes creating exemption from attachment or execution are to be liberally construed. If by this, it is meant that articles, clearly not within the exemptions enumerated, are to be construed by the Court as if they had been named and exempted, the powers of the Courts will be greatly enlarged and those of the Legislature correspondingly abridged. It can hardly be claimed that this is within the province of a Court whose single duty it is to declare, not to make, law.

That an individual's property should be answerable for his debts is as just as it is general. The statute, creating exemptions from this general rule, is special, at variance with the common law as well as general usage; the exceptions it creates are made matters of special enumeration.

The rules by which such a statute is to be construed and its terms defined, are simple and elementary, and the single province of the Court is to follow these rules and to ascertain what was the meaning of the legislators. If the term employed by the law-giver has received a prior judicial construction it is assumed that it was employed in the law in the sense thus judicially ascertained.

Second—in accordance with the general structure and use of the term as employed in the language; this meaning is to be ascertained from approved lexicographers and writers. Thus, if it have a general and popular signification, though at variance with the meaning as given by lexicographers and writers, the Legislature will be presumed to have followed the popular, rather than the technical orthography. What then did the Legislature mean to include in the term "wearing apparel?" I find no authoritative judicial opinion upon the question, and a reference to dictionaries gives the following result: Worcester defines "apparel" to be "dress," "clothing," "attire," "array," "vesture," "raiment."

Webster defines it "external clothing," "vesture," "garments," "dress."

By the same authorities a watch is described as a "pocket time piece," "a small horological instrument to be carried in the pocket." [Worcester] By Webster as "a small time-piece or chronometer to be carried in the pocket or about the person, in which the machinery is moved by a spring." I find no definition given of a watch that would classify it as wearing apparel, unless I am prepared to include all other machinery prepared for and adapted to a specific purpose, such as corn shellers and apple parers, within the same definition.

It is earnestly argued by counsel that the Court is to take notice of the changing customs and habits of the country, and that because watches are now universally used, this fact in some way transforms them from pieces of mechanism to articles of clothing. The same argument might, with perhaps more propriety, be applied to the case of a velocipede that may, to some extent, supersede the employment of a horse. I hardly think that this fact would so change the character of the article that the velocipede could be held exempt under a statute exempting horses. Nor does the fact, if fact it be, that watches are occasionally carried as matter of ornament or ostentation, affect the question. Their primary use is for the measurement of time. Apparel is dress worn upon the person for the purpose of comfort and decency. Custom and convenience may make the time keeper as indispensable to every man's happiness and convenience as clothing. So it may with a purse, a pocket knife, a pistol or a paper of tobacco; but this fact of general use would hardly bring these somewhat incongruous articles within Webster's definition of external clothing.

To briefly repeat, I have only to ascertain what the Legislature meant by the term "wearing apparel." Construed by every rule through which the meaning of an ordinary term in common use is to be ascertained, I am of opinion that a watch, carried in the pocket for the purpose of measuring time, is not "wearing apparel" within the meaning of our statute.

Judgment for the defendant for costs.

CITY vs. PARR.

DECISION RENDERED IN AUGUST, 1874.

Upon the facts found in this case, the question presented is this: "To what extent can a riparian proprietor protect his lands against the encroachments or overflow of the stream?"

If the principles regulating the exercise of this power are well established, they are not very clearly defined. It is said "that it is the right of the land owner to erect such bulwarks as will confine the stream within its natural channels, as will prevent its washing away the adjacent lands." "But," says the same high authority, "though the river threatens to change its channel and to encroach upon your land, you cannot protect yourself to the prejudice of the opposite proprietor." Angell on Water-courses, 334.

It seems, however, to be admitted, "that as against accidental and extraordinary casualties as the bursting forth of sudden floods, self-preservation will permit a party to protect himself or his property even at the expense of his neighbor." Ibid, 335-6.

I shall make no attempt to reconcile the principles of these decisions, but shall content myself with the statement of a few propositions upon which the conclusions of law reached in this case may be safely grounded:

First.—That it is the right of riparian proprietors upon a stream to have all the natural outlets and estuaries of such stream, through which its waters are accustomed to flow, free from all artificial impediments and obstructions preventing such flow to the prejudice of such proprietors.

Second.—That the right of such proprietor to the free passage of the waters of such stream is not limited to the principal and usual channels of the stream, but extends to such outlets, estuaries and sloughs as receive and discharge the waters of such streams in floods and seasons of *ordinary* high water.

Third.—That the right of the riparian proprietor to maintain unobstructed and uninterrupted channels and estuaries through which the waters of ordinary floods are discharged, does not extend to such topographical inequalities or depressions as may be flooded only by the waters of extraordinary and exceptional rises and freshets, and the fact that the waters of a stream, under exceptional and extraordinary conditions, overflow a particular section, or pass off in a given direction, does not constitute the site of such exceptional flowage a part of the channel of such stream in such a sense as will preclude the riparian proprietor restoring the bank of the stream to its primal condition, or protecting himself against the recurrence of such overflow by suitable embankments.

Fourth.—Where, from the operation of natural laws, as geological movements, climatic changes, or from altered conditions resulting from general and permanent, though artificial causes, as the cultivation of large areas of land, the destruction of forests and the like, the bed, the volume, or the characteristics of a stream are permanently changed, the riparian proprietor may protect himself from the consequences resulting from such changed and changing conditions, and may, by bulwarks and embankments upon his own land, restrain the stream to the same position it maintained relative to his premises before it was affected by such disturbing causes.

Fifth.—That while such floods and stages of high water as occur at intervals of five or seven years may not be regarded as extraordinary or exceptional in the sense in which these terms are here employed, yet such a flood as is only once observed in a period of a quarter of a century, and the equal of which, anterior to such period, there is neither recollection retained nor trace remaining, is extraordinary and exceptional within the meaning here applied to these terms.

Sixth.—That "floods," extraordinary as above characterized, are classed with those exceptional phenomena, tempests, climatic changes and geological action, in and from whose possible but uncertain recurrence individuals can acquire no rights, and against which it is the privilege of each to protect himself by all available means; and if, in thus shielding himself, such averted consequences fall upon another, it becomes, as to such sufferer, "the act of God," and for its results no man can be held accountable.

Seventh.—That courts take judicial knowledge not only of the general laws of nature and the meteorology of a country, but of the acknowledged discoveries and conclusions of science, and they will recognize, without proof, the general fact that when a rapid mountain torrent passes into a plain, it has a constant tendency at such place to raise its bed and change its course, from the accumulation of coarse gravel in its channel. That the general cultivation of the lands upon the banks of a stream increases the solid matter taken by rains into such streams.

That the cutting down and destruction of large forests upon the banks of a stream has a tendency to make the floods of such stream higher and more violent than would the same rain-fall with such forests intact.

These are propositions well established by scientists and are generally recognized as the certain results of the given causes.

Each and all of these conditions accompany this case and co-operate either as the exclusive or accelerating causes of the change in the position of this stream. The flood of 1861-2, by which the land at this place was first broken, was unprecedented both as to magnitude and effect. Forests upon the banks of the stream have been destroyed and large areas of land brought under cultivation. Against such altered conditions, brought about by such causes—causes which from their general character, remoteness and permanence, may be considered without the creation and beyond the control of man—the endangered citizen may protect himself to the extent and within the limits here indicated.

In my opinion, the causes and character of the danger experienced and apprehended justified the erection of the embankment by these defendants. If, as a consequence, the waters of this stream, in augmented volume, have flooded portions of plaintiff's streets, the city's contest must be with the stream itself. It has no remedy against these defendants.

CITY OF SAN JOSE vs. DRIESCHMEYER.

DECISION RENDERED IN OCTOBER, 1871.

Two points are made by plaintiff in this case:

First.—That the use of this road by the public for over twenty years, without objection or obstruction, is a dedication by use that cannot now be revoked by the owner of the soil.

Second.—That the cutting away of the bank of the stream impairs its security, increases the danger of overflow and endangers the safety of the City of San Jose.

The rule is well settled that the dedication of private property to public purposes by mere use must be established by proof that such dedication was intended by the owner. This intention may be shown by acts as well as words. In the present case all the acts of Reed, the owner, point clearly to a purpose of abandoning to the use of the public, the site of this roadway. His declarations, not publicly made but expressed to a few of his immediate family, were, that he did not intend to relinquish. This contradiction between his conduct and his declarations he explains as follows: "That if he did not permit the public to travel here, they would take compulsory steps to open a road at a place less satisfactory to him." To prevent this he permitted the use of the road for twenty years. He fenced this roadway out for the use of the public as effectively as he fenced his other lands in from the public incursions. He sold lands and made of this roadway one of the boundaries in the deed, and the lands he sold were only accessible over it. The doctrine which holds that stronger acts are required to show dedication of wild lands than those in cities and towns, makes for the plaintiff in this case. That doctrine is based upon the proposition that the owner of lands not requiring inclosure ought not to be compelled to inclose simply to exclude travelers. In the present case the whole country was enclosed and in uses that required inclosure, and the roadway was fenced out and devoted exclusively to the purposes of a roadway. In my opinion, such acts as are here shown, thus characterized and continued, must outweigh the occasional declarations of the owner, made in his family and wholly variant from his action. In my opinion, there was here such a dedication by use of the site of the roadway in question, that the same cannot now be closed to the public by the former owner. If however, in this I am mistaken, I have no doubt of the right as well as duty of the City of San Jose to prevent the digging away of the banks of the Coyote River for the purpose of brick-making or for any other purpose which may impair their security. The argument that the danger from this excavation is but slight, the peril to the city not imminent or great from this cause, is entitled to no consideration. It is the right of the city to maintain the banks of those streams intact, to secure itself by preventive action against any practices which, in any degree, diminish their security. Nor do I agree with counsel that the peril from this cause is so remote that the plaintiff should enter upon a critical estimate of the enhanced danger before it should venture to restrain.

A brick-maker, deliberately excavating a pit from the channel of the Coyote upon the side of the City of San Jose, at a point upon the stream where the floods rise from twelve to fifteen feet, the excavation being one hundred and twenty feet in length, fifty feet wide and fourteen feet deep, that area of this stream being taken bodily away and this work proposed to be continued, certainly promises peril to the city if the work is so continued. Whoever may own the lands that border these streams, the citizens, as well as the city, have the right to see that the banks remain unbroken and that nothing be done to impair their security or diminish their capacity to resist the action of the floods. That the danger at this point is not so urgent, that the current is not so evasive, does not affect the question. Neither city nor citizen is required to wait until the entire bank of the stream is reduced to one common measure of danger and insecurity. It is its misfortune that other parts are weak; it is its advantage that this part is strong, and it is its right as well as its duty to so maintain it. That the act in question does weaken the bank and does become a possible element of danger is admitted, and this is all that is required. If parties must wait until floods verify their apprehensions, they would often find, as against such forces, that process of courts and efforts of men were alike futile. The City of San Jose is environed by streams that, when swollen by rains, become torrents, often submerging thickly settled portions of the town.

A special tax is annually levied and collected for the purpose of protecting against these inundations. It would be a singular anomaly in our municipal economy if the city should be constructing in one portion of the town, at great expense, artificial embankments to restrain these streams within their natural channels, while at another, a citizen should be suffered to dig away a natural bank for the purposes of a brick-yard. It is the right of the city to maintain these banks in their natural condition, and any practices out of the usual modes of husbandry that tend to impair the efficiency of these barriers should be promptly restrained. Injunction made perpetual.

SENTENCE OF TIBURCIO VASQUEZ.

DELIVERED IN JANUARY, 1875.

VASQUEZ, STAND UP! The ruling of the Court, denying the motion for a new trial, made in your behalf, leaves to me but a single duty, that of pronouncing the judgment which the law prescribes for the offence of which you here stand convicted.

I deem it, however, befitting this place and this occasion that something more than the mere formal words of sentence should be spoken.

The life you have lived—your wretched career soon to be ended—is full of warning and admonition to those who will heed. To the transgressor it points a life of crime, of violence and of outlawry, with its fit ending in a death of shame.

Well may those, who are following in the footsteps of your earlier years, take warning from your fate, to turn while they may from a path that but leads to certain destruction.

The history of your life, shown by the criminal records of the State, disclosed by your associates and told by yourself, is one unbroken record of lawlessness and outrage, and you entered upon manhood a convicted felon in the penitentiary of the State. The sharp admonition of this early punishment was wholly lost upon you; and when restored to liberty, you adopted the life of a robber and entered upon a career of outrage, pillage and murder that knew neither limit nor interruption, until the strong hand of the law reached forth and grappled you.

For years, in the section of the State plagued with your presence, outrages known to be yours, crimes self-avowed, made your name the synonym for all that was wicked and infamous; and the broadest charity can scarce hope that even the much we know is all that is to be known.

What hidden crimes—what secret deeds of violence and of murder, unseen and unrecorded of men, may stain your hands and burden your conscience, Omniscience and yourself can alone know. This was your accepted career, that of a robber—these the deeds of your every-day life when the crime you are now called to answer was committed.

The story of that deed has been again and again repeated—told by the witnesses of that bloody tragedy, by your accomplice who here confronted you, and by yourself.

Proven and confessed, it appears that you planned the robbery of the store at Tres Pinos; and with a band of kindred spirits, armed and prepared as well for murder as for pillage, you attacked the place you proposed plundering.

Your numbers—your preparation—the completeness of your surprise—made resistance hopeless, and it was not even attempted; and without bloodshed or opposition you might have secured your booty and made your escape. Why this did not content you—what fell spirit instigated the three-fold murder of that night, no man can answer for you, nor have you answered for yourself. The men you slew were not those whose goods you coveted; two of them strangers and wayfarers that an unhappy chance brought in your cruel way. They possessed nothing you could desire; they made no obstacle to your purpose. Helpless, unarmed and unresisting, you slew them in the mere wantonness of butchery; and with their corpses at your feet you gathered the paltry spoils of your four-fold crime and fled to the mountains.

Aided by the situation of the country you eluded for a time the officers who were in your pursuit, and at last seem to have fancied that your offences were forgotten and your safety assured.

Unfortunate man! Vain delusion! The blood of your murdered victims cried unceasingly for vengeance, and there could be for your crime no forgetfulness, for you no refuge. Justice might be for a time delayed, she would not be baffled. The State whose laws you had set at defiance—whose citizens you had ruthlessly murdered—aroused herself for retributive justice. The commonwealth, with all her resources of men and of treasure, was upon your track.

With tireless purpose and exhaustless means she followed you in all your wanderings and made of your vicious associates her most efficient instruments. In every camp that gave you shelter her officers bartered for your surrender.

In the confederates you trusted she found the men ready to betray you. From such a pursuit there could be no escape, and you are here—here with the record of your lawless life well nigh ended—without one act of generosity—one deed of courage even to relieve its utter depravity.

The appeals you have made to your countrymen, for aid in your present distress, have met a response becoming them and befitting you.

Shocked at your atrocities, they have neither aided you to escape the punishment merited, nor pretended the sympathy you have sought to invoke. They have left you to answer alone at the bar of justice, with the memory of your many victims before you and the dark shadow of a certain doom about you. Indulge no illusive hope that that fate can be averted or even long delayed. Every appeal that zeal could suggest or eloquence urge was pressed upon your jury, in the hope that they might be persuaded to leave you the pitiful boon of life. But the jury heard the story of your crime from yourself. Unshrinkingly they accepted the responsibility of adjudging the penalty merited, and in their deliberations they determined, and in their verdict declared, you unworthy to live.

Of that verdict there can be but one opinion, that of unqualified approval. Upon this verdict the law declares the judgment, and speaking through the Court awards the doom – a penalty commensurate with the crime of which you stand convicted and thrice merited by the three-fold murder that stains your hands.

That judgment is death – that you be taken hence and securely kept by the Sheriff of Santa Clara County until Friday, the nineteenth day of March, 1875; that upon that day, between the hours of nine o'clock in the morning and four in the afternoon, you be by him hanged by the neck until you are dead; and may God have mercy on your soul.

EX PARTE. AH IN—HABEAS CORPUS.

DECISION RENDERED IN OCT. 1875.

Ah In, a Chinaman having been previously convicted in the County Court of the crime of carrying on a banking game, called "Fan-tan," was sentenced by the County Judge to pay a fine of $300, or be imprisoned in the County Jail until such fine was paid, said term of imprisonment not to exceed one year. A writ of habeas corpus was sued out and defendant taken before Judge Belden. The defence of the writ was that the judgment was void, because it did not fix the term of imprisonment in default of payment of fine. Judge Belden dismissed the writ, giving the following reasons]:

The sections principally relied upon are Section 1205 Penal Code, which, as amended, reads as follows: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the imprisonment which cannot exceed one day for every dollar of the fine." This section, it is claimed, applies to this and to all cases in which the alternative of imprisonment follows the non-payment of a fine. Under the Gaming Act, the penalty is as follows, namely: a fine of not less than $200, nor over $1,000, and imprisonment until such fine and costs of prosecution are paid, such imprisonment not to exceed one year. Sec. 330 Penal Code. The act of which this is the penalty is *sui generis*. It creates and specially defines the offence and provides for it a special penalty, that penalty a fine with the alternative of imprisonment until such fine is paid. The only discretion left to the Judge is the amount of the fine, and that exercised, the party is to pay it or be imprisoned until it be paid, the term of imprisonment not to exceed one year. The attempt to unite the provisions of this Act with those of Section 1205 above cited, present irreconcilable difficulties. The maximum fine under the Gaming Act, would permit a term of imprisonment under the general section nearly three time greater that Section 330 allows. The Judge may impose a fine of $1,000; he can imprison but one year. The party may serve out his fine at the rate of one dollar per day. He shall be imprisoned until the fine is paid. These are a few of the contradictions that follow from any effort to construe and apply these sections together. In my opinion the Gaming Act is to be construed by itself; that the fine is to be fixed by the Court; that either the party pays the fine imposed or suffers the alternative penalty of imprisonment for one year I see no other mode of giving effect to the several provisions of Section 330, and see no way to reconcile this Section with Section 1205. Construing Section 330 so as to give effect to all its parts, the Court is to impose the fine. Its amount determined and declared, exhausts the judicial discretion of the Court. The Statute then speaks in the judgment: "He shall be imprisoned until this fine is paid, not exceeding one year." Were the Court to fix any term for the imprisonment less than the payment of the fine imposed, its action would be in plain contravention of the statute. This term of imprisonment is not to exceed one year. The effect of the Statute is to require the imposition of a fine not less than $200 nor more than $1,000. Imprisonment until this fine is paid; in default of payment, imprisonment for one year. If this construction be correct, the words "not to exceed" may be treated as surplusage—the judgment a fine of $300, with the Statute declaring the alternative imprisonment for one year if the fine be not paid. If this conclusion is not entirely satisfactory it is the only mode I see of reconciling the provisions of Section 330 under which the judgment was rendered.

Writ dismissed and defendant remanded.

EX PARTE. JOSEPH O'KEEFE ON HABEAS CORPUS.

DECISION RENDERED IN AUGUST, 1875.

To the writ issued on the petition, O'Keefe, the Sheriff of Santa Clara county, makes return in substance, as follows:

That he has O'Keefe in custody as Sheriff upon a commitment from Hon. D. S. Payne, County Judge of Santa Clara County, said commitment made part of his return, reciting that O'Keefe has, upon due inquiry before said County Judge and two physicians, been found to be insane and dangerous to be at large, and the Sheriff is ordered to convey him to the State Insane Asylum and place him in charge of the officers thereof. The Sheriff further returns that he also detains petitioner pending a jury trial ordered for the purpose of inquiring as to his restoration to sanity.

It is admitted that the statutory steps have been taken as provided for inquiries of this character, and that the commitment exhibited by the officer is formal and regular. It is objected, however, that the warrant of the County Judge is no justification for this detention, for the following reasons:

First.—That by this proceeding the petitioner is deprived of his liberty without trial by jury, in contravention of Section 3rd, Article 1st, of the State Constitution.

Second.—That this is a judicial proceeding and that, by the Constitution, all judicial powers are vested in Courts and not in Judges, except in special enumerated cases.

Third.—That this is a Chancery proceeding and only cognizable in a Court possessing Chancery powers, and that it was not in the power of the Legislature to confer this power upon either County Courts or County Judges, but that the same falls within the class assigned to the District Courts by Section 6, Article 6, of the State Constitution.

The argument by which those positions are sought to be maintained is, that the District Courts of this State have succeeded to the powers and exercise the jurisdiction in measure and mode as it was exercised by the English High Court of Chancery. That inquiries into lunacy were there heard by Commission appointed under the Great Seal and before a jury, and that the District Court and none other can exercise this jurisdiction here, and then only when sitting as a Court and with the intervention of a jury.

An examination of some of the text books has satisfied me that this inquiry was not, at common law, a judicial proceeding in the sense in which the term "judicial power" was employed by the framers of our Constitution in classifying the several Courts and fixing their several jurisdictions. Under the English system the King was the source, or reservoir from which all governmental functions were distributed. It was at his command that Parliaments were assembled, Judges appointed, ecclesiastics invested. In the King centered or originated all power, judicial as well as political, and these were distributed through such channels and and administered through such subordinate officials as might best secure their prompt and proper administration.

Eleven Courts are enumerated by Mr. Blackstone through which the judicial power of the King was exercised. The origin and powers of these several tribunals are fully set forth, and in and through these, it is fair to assume, all the judicial functions of the King were exercised. But besides these judicial powers, the King, as Sovereign and Head of the State, was invested with a vast range of attributes, many of which, as pertaining to duty, privilege or prerogative, were, in contemplation as well as in fact, exercised by the King in person or under his immediate supervision. Among these was the custody of idiots, the inquiry as to persons that were lunatics or of unsound mind:

"This jurisdiction exercised by the King through his Chancellor was not," says Mr. Blackstone, "necessarily annexed to the Great Seal, but it was expressly declared by the House of Lords that this custody was in the power of the King who might delegate the same to such person as he should think fit, and, upon every appointment of a Chancellor a special authority is given, under the sign "Manual Royal," to the Chancellor for this purpose, and no appeal lies from the Chancellor's orders in these matters, but only to the King in Council." 1st Blackstone 304 (note).

This special supervision of idiots and insane persons seems to have had its origin in a feature of the feudal system, by which when a "feudatory" being incapable, as *purus idiota*, of rendering service for his lands, inquiry was had at the instance of the Sovereign, and if found permanently incapacitated, the lands reverted to the King.

Mr. Blackstone further classifies the custody of insane persons and of their estates as one source of the King's revenue, and again says, "That this special charge of the idiotic and insane belong to the King as *pater patrias* and charged with the protection of the helpless."

Be that as it may, it is apparent that the King's authority was withdrawn from the ordinary and usual channels through which justice was administered in the realm, and was retained and exercised by the King in person, and as part of his royal prerogative, delegated to none of the eleven courts commissioned by the King, it remained in the sovereign part of his political power to be exercised by him according to his good pleasure. To this reserved power, this attribute of sovereignty, the States have, in their sovereign capacity, succeeded, and this authority may be exercised in such modes and through such means as the Legislature may prescribe. Cases were cited in which, in several of the States, this inquiry was under writ from the Chancellor before a jury. An examination of the judicial systems of the Statutes of these States will probably show either direct legislation thus providing, or that the chancery system of these States has been modelled upon that of England, and the English course of procedure made, by rule or otherwise, the practice in such States.

The farther argument urged that this procedure deprives the citizen of his liberty and his property without trial by jury is, in my opinion, untenable. This clause in the Constitution related to loss of liberty as a punishment, to property taken from one and bestowed on another. It did not refer to those temporary restraints that are imposed solely for the benefit of the party, and neither as a penalty or a punishment, nor to the control of property temporarily bestowed on another that it may be the better preserved to its owner. This clause of the Constitution, taken from "Magna Charta," was intended to secure the citizen a jury in all those judicial proceedings in which, in the courts and through the forms of law, he might be deprived absolutely of liberty or property as a punishment, or through judicial determinations. The causes that led to this declaration need not be repeated; they are the school-book history of all English-speaking people, and the laws at Runnymede, in declaring "That the right of trial by jury should remain forever inviolate," but incorporated into the recognized judicial proceedings of the realm and of the age, this popular element, to counteract the subserviency of the Judges of the King, and to protect themselves against the usurpations of the Crown asserted through the intervention of the courts.

I am satisfied that none of the objections taken by the petitioner can be sustained; but were I in doubt, did I seriously question the power of the Legislature bestowed, and, in this instance, exercised by the County Judge, I should give much weight to considerations of expediency before I should assume to annul this proceeding.

It is a maxim in construing legislative power, that it is only in clear and undoubted cases that the judiciary are to interfere, and many writers of eminence hold that this, as a power, should be exercised only by tribunals of last resort.

It is often said that when by long acquiescence in a statute, either a right of property or a rule of procedure, has been obtained, when extensive rights have grown up under a given constitution, the courts will be still more cautious in declaring void the legislation that is the foundation of such extended rights. In such cases considerations of expediency have been entertained by courts of the highest dignity, and jurists of the most eminent capacity. These considerations in this case require no suggestion, but from their magnitude and gravity, press themselves upon the judicial mind. The Constitution that distributes the judicial powers of the state was adopted a quarter of a century ago; many of the framers of the Constitution were members of the Legislature that succeeded its adoption.

The first Legislature that assembled made provision for inquiry as to insanity, to be conducted in substantially the mode now pursued, and this has been the practice from that time to the present. Twenty successive Legislatures have recognized this practice, three amendments to the Constitution have left it unchanged, and thousands of insane persons have been committed to the state institution by virtue of the laws now, for the first time, called in question. Farther than this, in another field, the county courts, exercising an authority now characterized as an usurpation, have taken jurisdiction of the estates of infants, and property incalculable in value has passed by orders and decrees that, it is now argued, could only legally emanate from a

District Court. A court of *nisi prius* jurisdiction may well pause before it declares a rule that entails such consequences.

I may go further. If the argument contended for be sound; if it is a *court* alone, and that court a District Court, requiring a jury, that can examine these questions and make the order that will secure the unfortunate insane admission to the state asylum, we are met by the fact that there is no legislative provision for the prompt action that this class of cases imperatively demands. The Courts, both District and County, have terms fixed by law, in many instances, with intervals of from two to six months. If this inquiry must be made by a *court*, it will often happen that the wretched lunatic must be incarcerated in a county jail for months and until the incipient delirium has become confirmed madness or established idiocy, before the order can be obtained which is to secure him the scientific and kindly treatment that his case demands, and which, to be efficient, must be active and instant. From such construction as will leave the custody of these unfortunate persons to the janitors of jails, courts may well shrink, and expediency and humanity well protest. With this the result, not probable merely, but inevitable, of the construction contended for by petitioner, it must be the court of last resort that declares the rule which leads to such consequences.

The writ is dismissed and the petitioner remanded to the charge of the sheriff.

CHAPTER VII.

SENTENCE OF JESUS ANDRADE.

DELIVERED IN SEPT., 1875.

THE Court has considered the appeals and suggestions of your counsel and has also reviewed in its own mind, the testimony upon which you here stand convicted. That testimony, briefly summarized is as follows:

That you were at a ball at the Guadalupe Mine; that yourself and the deceased had a controversy of words, which resulted in his seizing you with roughness, if not making an intentional, violent assault upon you; that he was a man of dangerous and violent character, likely to get into brawls of this nature, and that you, yourself were of a quiet and harmless disposition; that, after the rough usage to which I have referred, you left the bar-room in which the deceased had been, immediately followed by deceased; that after you had gone some distance from the room firing was heard of three shots, one of which was undoubtedly fired by the deceased and two by yourself, one of the shots fired by you inflicting the fatal wound of which Escobar immediately died; there were no witnesses to what transpired without the room; but from the character of the deceased and the character of yourself, and from what transpired to which other witnesses did testify, there was at least a possibility that the party who was the aggressor within the room, was following up his aggression without, and it is possible that the fatal shot was given in necessary self-defence. Upon the facts that were submitted to the jury, they found you were not guilty of the high crime charged in the indictment, but finding you guilty of the lowest offence known to the law under the indictment, they have indicated their belief that you were not blameless; that you, perhaps, might have withdrawn from the conflict without taking the life of a human being. They gave you the benefit of all doubt as to the higher offence, but the verdict of manslaughter determines that you yourself are not without blame. I have, as I said, reviewed the testimony in my mind fully and thoroughly. From the circumstances I have here intimated, it seems to me possible that you may have been merely defending yourself in the continuation, without the room, of the contest in which this difficulty began. I shall supplement the verdict of the jury in the leniency of the sentence, which I here pronounce, as lightly, probably, as is ever rendered in cases of this character. The judgment is that you be imprisoned for one year in the State Prison of this State.

SUPERVISORS' COMPENSATION.

[The following opinion was given by Judge Belden in response to a request by the Board of Supervisors of Santa Clara County, April, 1875.]

In the matter of the compensation of the Board of Supervisors of Santa Clara County: Sundry questions have arisen in the Board of Supervisors of Santa Clara County, touching the compensation of its members for certain services. An agreed statement of these questions has been laid before me by the Board, and my opinion requested thereon.

No pretence is made that there has been bad faith or dishonesty upon the part of any of these officials, or that the county has not been most thoroughly and efficiently served, or that the compensation claimed has not been most justly earned. The inquiry is simply one of statutory construction and official relation, and to this proposition I shall restrict my inquiry.

A statement of the accounts has been laid before me by the Clerk of the Board. Upon this statement the charges in question appear and may be classified as follows:

First—Mileage of the members in travelling from their residences at the County seat at other terms then the four quarterly sessions prescribed by the statute.

Second—The right of the members to charge for their per diem at other sessions of the Board than the four stated meetings.

Third—The right of the Board to appoint its members upon Committees to supervise the erection of public buildings, the public roads and other matters of public interest and pertaining to the affairs of the County, and to allow compensation for such services; the duties for which such compensation is proposed, being performed during the vacations of the Board.

Fourth—To allow members of the Board travelling expenses other than mileage in transacting the business of the County.

Other questions of a less general character are presented, that will be briefly considered.

The general rule as to the compensation of public officers is that, unless the law that imposes the duty also provides the compensation, none is allowed; that such implied obligations to remunerate for beneficial services as would arise between individuals, are not permitted between the official and the body politic, and it has been repeatedly held that where the Legislature, by subsequent enactment, has imposed upon officials very onerous and burdensome duties, but made no provision for increased compensation, none could be allowed. The question is not what are the services worth or what, in justice, ought the officials to be paid, but what has the law by its terms said he may receive.

The provisions of the statute relating to the compensation of the Board of Supervisors of this County is found in Section 27, page 175-6, Statutes 1869-70, and the portion relating to the present inquiry reads as follows:

"Section 27.—Each member of the Board of Supervisors shall receive the sum of $6 per day for each day necessarily employed, and said members shall, in addition thereto, be allowed a mileage of twenty cents per mile in travelling to and from their residences to the County seat, provided that no charge shall be made for more than one trip going from and returning to the residences of such Supervisors at each term held at any County of the State. * * * * And in the Counties of Monterey and Santa Clara, the per diem of any member of the Board of Supervisors shall not exceed $400 per annum."

These paragraphs, read as they must be together, contain three propositions, two providing a measure of compensation as to per diem and mileage, and one prescribing a limitation of $400 upon the per diem allowance of each member for each year. But while the limitation as to per diem allowance is as clear as language can express it, no such restriction is placed upon the mileage that may be allowed, other than that but one mileage can be charged for each term.

I shall first consider whether the members can receive the per diem compensation for other sessions than the quarterly ones at which the current business of the county is transacted. Besides these terms last referred to the statute requires the Board to assemble at stated periods for the discharge of other official duties. It thus convenes as a Board of Equalization and also as a Board of Canvassers of Election Returns. In both these cases the time of assembling and the duties to be performed are as clearly and expressly defined as those of the other terms provided.

There are other sessions of the Board made dependent upon certain events, such as the submission of certain questions to a popular vote, upon petition, and the like. In all these cases, general and special alike, the same body of men is convened by authority of the same law. They meet at the same place, are presided over by the same officers, attended by the same clerk, their action evidenced in the same record. In my opinion it is the same Board of Supervisors, that is, *ex officio*, in these various capacities, charged with these several duties, and for the time thus engaged, its members are entitled to the $6 per day compensation to the annual amount of $400 to each member, and no more.

Upon the question of mileage, the law allows one mileage for each term and imposes no other restriction. If the view that I have above expressed be correct, *i. e.* that the several sessions of the Board are "terms," it follows that the members are entitled to receive one mileage for each such term.

It appears that the Board has been in the habit of imposing upon certain members of its body certain special duties to be performed during the vacation of the Board. These duties have consisted in the supervision of county buildings in course of construction, or overseeing roads and the like, and that for these services a per diem compensation has been allowed to the members so acting. It further appears that certain travelling expenses have been incurred by members of the Board in attending to matters of public interest and relating to county affairs. It is clearly shown that these services were honestly rendered and the compensation fully earned; and it is highly improbable that the same services could have been as well and as cheaply procured elsewhere. The charges in most cases were very small, and the benefits to the county very considerable; and were the question only one of beneficial services fairly compensated, these charges are beyond all criticism. It is not, however, a matter of discretion with either the Board in acting or the Court in construing its action. It is a question of power. Has the Board of Supervisors, charged as it is with the guardianship of the public interests, authority to enter into contract relations with its own individual members, and can it deal with those members as it could with other parties not of the Board? This question has been very emphatically answered; and the rule prescribed, as well as the reason given, must commend it to the sound judgment of all.

Says the Court: "But the fact that the several claims were allowed in favor of individual members of the Board, brings the case within the reason of a rule of more general application. The Board of Supervisors are constituted by law as guardians of the property interests of the county, and are given the entire control of its revenue. They occupy a position of trust, and in that relation are bound to the same measure of good faith toward the county which is required of an ordinary trustee towards his *cestui que* trust, or an agent toward his principal. It is a prevailing rule that the law will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. This rule has been carried so far that the courts have refused to inquire into the facts of a particular case to ascertain whether the trustee acted fairly or unfairly towards his *cestui que* trust. The mere fact of the existence of this relationship has been held to avoid the transaction." Andrews vs. Pratt, 44 Cal. 317. And in this case the Court held that certain warrants, by which the members of a Board of Supervisors undertook to vote themselves $1,500 each as a compensation for special services were absolutely void and should be cancelled. But little can be added to this precise summary of the positions and obligations of these officers. Duty to the public requires that they should subject to the strictest scrutiny every demand presented against the county. Self-interest should not be arrayed against this official obligation. It is the interest of the tax-payer and the citizen that the county shall receive the largest measure of service for the least expenditure of the public treasure. It is the interest of the individual to receive the largest compensation attainable for the smallest service, and this whether dealing with a citizen or a community; and while the members of the Board might scrutinize their own or their fellows' accounts with even more vigor than they would those of a stranger, still the law assumes that when personal interest is involved, the same unprejudiced and impartial judgment might not be exercised that it demands in the conduct of public affairs. This rule, in my judgment, is grounded in the soundest considerations of wisdom and public policy, and to deviate from this in any degree might open the door to the most pernicious practices. The items for special services upon committees during the vacation of the Board, and for travelling expenses, other than mileage in attending the sessions of the Board, should be disallowed. The sum of five hundred dollars allowed the President of the Board for services in the transfer and concellation of certain county bonds is, in express terms, provided for in the Act assigning these duties. The sum allowed seems a reasonable one and the employment a proper and authorized one.

As this inquiry is informal, made at the request of the Board, and not in any regular legal proceedings, I deem it unnecessary to review in detail, the several items of account referred to. The statement of the Clerk of the Board presents these various charges properly classified, and the Board can readily make the corrections necessary to conform the accounts of the several members to the rules I have here indicated.

JONES vs. JONES.

DECISION RENDERED IN JANUARY, 1876.

Upon motion of defendent to set aside a decree heretofore rendered herein granting plaintiff a divorce from defendant upon the ground of adultery.

The motion is urged upon the following grounds:

First.—That the testimony upon which the judgment was rendered was taken by the Judge of the Court in Chambers.

Second.—That the attorney of the defendant colluded with the plaintiff to betray the interests of his client, and fraudulently permitted the judgment to be taken against her without her knowledge and against her wish and consent.

The record as made up shows that, upon the 5th of November, 1875, plaintiff filed in this Court his bill against defendant, praying for a divorce upon the ground of adultery; that personal service of process was had upon the defendant upon the same day; that on the 6th day of November an unverified answer was filed upon behalf of defendant by regular attorneys of this Court; that upon the 8th of November, this Court being then in session, said cause was placed upon the trial calendar; that upon the evening of the same day the Judge of this Court, at the request and with the consent of the attorneys for both plaintiff and defendant, attended at the office of plaintiff's attorney; that the attorneys of plaintiffand defendant were both present, as was also the plaintiff; that witnesses were then and there by the Judge sworn and examined concerning the matters charged in said complaint, and that the Judge then directed that findings be prepared and submitted, finding the fact of adultery as charged in the complaint; that all said testimony was thus produced before said Judge, after the entering of the order of adjournment of Court of the 8th of November, and before the re-assembling of the Court upon the following day; that upon the 9th of November, in open court, the counsel for plaintiff submitted to the Judge the draft of the findings ordered and also a decree in pursuance thereof, which findings and decree were by the Judge then signed; that at the taking of the testimony in said cause neither the Clerk nor Sheriff were in attendance.

Upon these facts it is now claimed that the taking of the testimony in this case was without authority; that the only manner in which legal testimony can be received by this Court is when sitting as a Court, attended by the Clerk and in the court room of the county, and that this as a defective and illegal proceeding is in no way aided or cured by the fact that it was with the consent and at the request of both parties.

The case of *ex-parte* Bennett, 44 Cal. 85, is decisive upon this question. This was an action for divorce. At a regular term of the District Court for Sonoma county, counsel stipulated that an order might be entered then, that the evidence to be hereafter taken and reported by the Court Commissioner, "might be submitted to the Court and decided at Chambers, and the decision and judgment be entered as of this term of Court." In pursuance of this order the testimony was thereafter taken by the Commissioner, and after the adjournment of the term was submitted to the Judge in Chambers, and the Judge in Chambers ordered a decree of divorce to be entered as of the term preceding the actual determination of the case, which was done. The defendant was afterward imprisoned for non-compliance with the decree thus made. Upon habeas corpus to the Supreme Court, said the Court: "The petitioner contends that the decree having been rendered at Chambers, upon a *trial* of the cause had at Chambers and not in open court, is null and void. That a final judgment in an action may be entered either in term or in vacation is not questioned, such is the provision of the Practice Act (Sec. 144). The principal objection made for the petitioner, as we understand it, is that the cause was *tried* at Chambers and not in open court, and it is said there is no authority to *try* a cause except in open court.

" * * * The District Court of Sonoma county unquestionably had jurisdiction of the subject matter and of the parties litigant. * * * The hearing of proof, the argument of counsel, in other words, the *trial* had, or the absence of any or all these, neither confers jurisdiction in the first instance nor takes it away after it has once fully attached."

It was held that the proceeding was valid, and the petitioner was remanded to custody. The argument urged in that case was the same presented in this; the position of counsel was the same that is here assumed, and the Court replies to it as quoted and the decree is enforced. In that case no testimony had been taken when the first order was made. The term had adjourned when it was submitted and argued before the Judge in Chambers. In Chambers he accepted the submission, heard and determined the case, and ordered a decree as of a date preceding any of these proceedings. The case at bar is far within the facts of the case cited and the reasoning of the Court is beyond what is required to uphold the proceeding now under consideration. In this case all the proceedings were in term—the only irregularity (if such it be) was in the examination of witnesses as heretofore stated. I am satisfied that this, if an irregularity, is not such as will warrant the Court in annulling the decree in the mode here proposed.

The second point relied upon in support of this motion is the alleged misconduct of defendant's attorney. This proposition is presented upon the affidavits of the defendant herself upon the one hand, and that of plaintiff and the attorney in question upon the other. I have carefully examined these affidavits. In view of the fact that in another proceeding these several affiants will probably be called as witnesses in this Court to the same matters here presented, I deem it unadvisable that I should now discuss the merits of these contradictory statements.

I am of the opinion that upon the case presented by these affidavits I am not warranted in holding that the attorney of the defendant corruptly colluded with her adversary to betray her cause, while assuming to represent her interests.

The motion of defendant to set aside the judgment and vacate the decree of November 9th, 1875, is denied.

THE RAILROAD SUBSIDY.

DECISION RENDERED IN FEBRUARY, 1876.

Wm. H. Patterson vs. the Board of Supervisors of Santa Cruz County, brought to restrain the issuance of bonds to the Santa Cruz Railroad Company.

When the Court adjourned at noon the plaintiff submitted his case upon his bill, and the answer of the defendant, and upon these alone. The defendant moves for a non-suit upon the ground that the material averments of the complainant's bill are fully denied, and that as no evidence was offered upon the part of the plaintiff in their support, he cannot recover upon the case thus presented.

In opposition to this motion plaintiff urges and argues but two propositions:

First.—That the submission by the Board of Supervisors to the people of the county of two railroad propositions was in excess of the power given them by the so-called Five Per Cent. Act; that when one such proposition is submitted the power of the Board to act further and submit other subsidy questions is exhausted.

Second.—That the Legislature, by Act of January, 1874, repealed absolutely the so-called Five Per Cent. Subsidy Act, and that with this repeal was repealed and abolished all rights, inchoate or complete, that had before existed or were created by virtue of the original Subsidy Act.

These are the only two propositions that are urged by the plaintiff.

I regret that the limited time afforded me to examine this question has been so disproportionate to its importance and magnitude; but as the question must probably be determined by the Supreme Court, I suppose that the interest and convenience of all concerned will be better subserved by an immediate decision than by further delay.

Upon the first point urged by counsel, the exhaustion of the powers of the Supervisors by the submission of one question, I do not agree with the plaintiff. In my opinion, the limitation as to supervisorial power is determined by the proportion which the tax bears to the assessable property of the county, and is judged by this alone; that the number of such enterprises that may be considered, or their diversity as to location, is immaterial, so that the aggregate is found to be within the 5 per cent. limit prescribed by the Legislature.

Upon the second point, that the Legislature, by repealing the original Subsidy Act, has repealed all rights that had arisen under it, I do not consent to this proposition. I understand that it is in the power of the Legislature, by repeal, to abrogate all forms of legislation which have not in some measure ripened into a contract relation; but that when, from the legislation sought to be repealed, it appears that contract rights have arisen, inchoate or complete, then such rights are placed within the protection alike of the Constitution of the United States and of this State, and becomes vested rights as to those claiming this benefit, which are beyond the power and purview of legislative interference; and while, in many cases decided, very nice and subtile distinctions are drawn as to when a Legislature may or may not thus interfere, yet I understand that when any element of contract is involved which the Court can see might be disturbed by the legislative interference, it places the inhibition of the Constitution upon the Legislative Act thus attempted in derogation of individual rights.

It is claimed by counsel that the Five Per Cent. Subsidy Act, however, is a mere gratuity, having no consideration for its support, and may be withdrawn at the will of the Legislature, as a pension or annuity might be repealed. I do not so understand the Act, nor can I see how that could be maintained, or any subsidy upheld upon the theory that it was a mere gift or gratuity that was bestowed. The many decisions, State and National, which have upheld subsidies by political bodies to corporations of this character, have proceeded upon the theory that reciprocal benefits, advantages and obligations exist between the public affording the aid and the corporation receiving the benefit; that increased facilities for transportation and inter-communication upon the one hand, were a sufficient consideration for the subsidy bestowed upon the other. It is upon this theory and this alone that any plausible excuse can be found for turning the public revenue derived from taxation into private enterprises of any character, and the proposition that these subsidies, so styled, are mere gratuities, pure donations, finds no support, either in the cases which maintain them or the reasoning by which they are upheld. In my judgment the granting of a subsidy and its employment create reciprocal obligations which rise to the dignity of a contract and which may be enforced in a proper proceeding by proper authority.

It is argued further by counsel for the plaintiff, that while this might be true as to an executed contract, yet that the contract now in hand is an executory one, and therefore revocable at the will of the Legislature. I do not deem it necessary to consider this argument to the extent to which it is urged. It is sufficient to say that so far as the $30,000 subscription here asked for is concerned, the contract to the extent of the five miles provided for is executed and complete, and the argument therefore of counsel, that the general contract has not yet been completed, has no application to the present case in which a completed feature of the contract is sought to be enforced. It is further claimed by counsel that the contract set forth in plaintiff's complaint between the Board of Supervisors and the railroad company, is wholly inoperative, for the reason that the Board of Supervisors have no authority to enter into such contract; that the subsidy voted by some form passes directly to the beneficiary, and that the County has no power to secure by proper contract obligations the application of its aid. I do not agree with counsel as to this position. It would be a singular position if, after the vote of the people had determined that aid should be given to a railroad company for a specific object, the financial representatives of the people, "the Board of Supervisors," could take no precautions to see that the money thus voted was applied in the manner contemplated by the will of the people. If the argument of the counsel be correct, it would be the duty of the financial officers of the County upon the vote being declared to immediately turn over to the railroad company the subsidy agreed to, leaving it entirely to the good faith and honesty of the recipients to carry out the purpose had in view. I have no doubt that it is the right, as it is the duty of, the Supervisors in every matter in which the County interests are involved or the County moneys to be disbursed, to secure the proper performance of obligations in which the County is interested, by contracts and bonds, and whatever else may be required to secure the purpose contemplated; and I have no doubt that in the present case the contract of the Board of Supervisors made with this railroad company was in strict conformity to their duty, and that this action, and the laws under which the Board were acting, did create in its fullest sense a contract with which neither Legislature nor County can interfere.

I am satisfied that upon the case made by these pleadings and now presented on this motion for a non-suit, the defendant is entitled to the judgment asked. Ordered that plaintiff be non-suited.

DEVILLE vs. SOUTHERN PACIFIC RAILROAD COMPANY.

DECISION RENDERED IN FEBRUARY, 1876.

With other matters, the plaintiff's statement shows that at the time of his injury he had left his horses unfastened in close proximity to the railway track of defendant; that this was after the time for the passage of the regular train, but that the train had been somewhat delayed and had not yet passed; that, as the train approached, his horses changed their position, and while he was endeavoring to prevent their getting into a position of peril, he, through the carelessness and negligence of the defendant, received the injuries complained of.

The defendant claims that the specific grounds above set forth, were declared, by the Supreme Court, to entitle the defendant to a non-suit and insists that a non-suit be now granted. The plaintiff replies that the case he now states differs in essential particulars from that passed upon by the Supreme Court, in this:

First.—That he now shows that the train was behind time, and that the plaintiff therefore did not leave his team unattended at a time when a regular train was expected to pass.

Second.—That he now shows that he was preventing the team getting into a dangerous position, not rescuing it from a peril in which it was already involved, as was intimated in the opinion of the Supreme Court.

These distinctions, he contends, take the case without the ruling made in the special case by the Supreme Court, and without any rule by which he can be non-suited. I shall consider the first proposition only. Although the Supreme Court, in ruling upon the motion for a non-suit, did speak of plaintiff leaving his team unhitched near the track about the time when the regular train might be expected to pass, I do not think they proposed the controlling weight to be given to the circumstance of *time* that is contended for by counsel. In Flemming vs. S. P. R. R. Co., 49 Cal. 253, the train was behind its regular time and there was a very serious question whether those in its charge were not derelict in not giving the signals required by statute. But in that case the Supreme Court seem to have considered that the vicinage of a railway track is a situation of peculiar peril requiring special precautions, and these not confined to any special period of time, but incidental to the place and to be always exercised when such tracks were approached. In the case of Deville they held that to leave horses unhitched near such a track was negligence. To limit this rule by the circumstance that a regular train is likely to soon pass, making it negligence or otherwise, as the failure to hitch should correspond with the Company's time table, the rule and its application varying as trains should chance to be before or behind schedule time; abrogating it entirely, as he must, for special trains; qualifying it with the changes that the Company make in their regular time tables, the knowledge or opportunities for knowing the times of trains made matter of inquiry in every case—these are a few of the many but apparent complications that must follow if the rule indicated by the Supreme Court is to receive the qualification insisted on by the plaintiff. Accepting, as I do, the rule indicated by the Supreme Court in this case as that which is to govern in all cases of this character, I deem it simply judicial duty to make of it a fair and reasonable application.

I think the plaintiff has stated himself within the application of the rule announced and upon the authority of the cases here cited the non-suit will be granted.

EX PARTE. JOHN WILLIAMS—HABEAS CORPUS.

DECISION RENDERED IN SEPTEMBER, 1876.

The return of the Sheriff to the writ issued herein shows, as authority for the detention of the petitioner, two commitments from the Justice Court of J. S. Tilley, an acting Justice of the Peace of Santa Clara County. These commitments are dated September 20, 1876. By one it is adjudged that the petitioner give sureties in the sum of five hundred dollars, to keep the peace for a term of six months, or that, in default thereof, he be imprisoned for six months in the county jail. By the other commitment it is recited that the petitioner has been adjudged guilty of an assault and battery upon his wife, and it is ordered that he be "punished by twenty-five lashes on the bare back, by the Sheriff of Santa Clara County, said punishment to be administered on the 23rd day of September, 1876." Since the issuance of the writ of habeas corpus, the petitioner has given the bond to keep the peace, and the only cause shown for his detention is, that the punishment of flogging may be administered as directed by the judgment of the justice. The authority for this judgment is found in Section 243 of the Penal Code as amended by the last Legislature. By this amended section it is provided: "A battery is punishable by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months; or if committed upon the wife of the assailant, it shall be in the discretion of the Court to punish the offender by the infliction of not less than twenty-one lashes on the bare back, to be administered by the Sheriff of the county or any constable of the township."

Upon the part of the petitioner it is objected:

First.—That the time at which this punishment was to be inflicted having passed, the officer is without authority to proceed further; that the time is as essential an element of the punishment as the mode, or the number of lashes to be administered.

Second.—That the Act of the Legislature is void, as being in derogation of Sec. 6, Art. 1 of the State Constitution, which provides that "cruel and unusual punishment shall not be inflicted."

The second objection is the only one I shall consider. This inhibition upon "cruel and unusual punishment" is found in the Constitution of the United States and in most, if not all, of the State Constitutions. It has received but little consideration from the Courts, and the commentators who have reviewed this section are by no means harmonious. By some it is held that "whatever was a mode of punishment at the common law must be taken as being neither cruel nor unusual under our Constitution," while others maintain that "this clause is to be interpreted by the light of the advanced humanity of the age, and that whatever public sentiment condemns as barbarous or repulsive, must be adjudged to be cruel or unusual."

It may be questioned whether either view presents the correct method of treating the question. If whatever was known to the common law as a punishment is without the constitutional inhibition, then cropping, maiming, mutilating, branding, the pillory, the stocks, the ducking stool, all the savage barbarities of a cruel era may be re-enacted at pleasure by the Legislature, and it is difficult to see upon what this constitutional prohibition is to act.

If, upon the other hand, this section is to receive the varying constructions which will conform it to the changing sentiments of the community, it must prove a most unstable rule for either defining or protecting the rights of the citizen. The question, in my judgment, is not to be solved by inquiry as to the practices of a century since, nor by the sentiments of to-day, but by ascertaining what was understood to be "cruel and unusual," by those who adopted this Constitution in 1849.

Says Mr. Cooley, in his work on Constitutional limitation, page 330: "The degrading punishments which, in any State, had become obsolete before its existing Constitution was adopted, we think, may well be held to be forbidden by it as cruel and unusual. We may well doubt the right to establish the whipping post and the pillory in States where they were never recognized as instruments of punishment, or, in States whose Constitutions, revised since public opinion had banished them as cruel and unusual punishments."

What, then, did those who adopted the Constitution of 1849 understand by the terms "cruel and unusual." Most of those who took part in the formation of this instrument were new-comers to this coast. Fresh from association with the legislation of the older States, they regarded those penalties as neither cruel nor unusual, that they had seen civilized communities everywhere inflict. The recognized punishments of the various States, they were willing should be inflicted here, but further than this, the Legislature should not go. A very cursory examination of the history of the States will show that whipping as a punishment for crime was a most unusual and exceptional infliction in the year 1849. In the early days of the Colonial settlements flogging was quite generally administered for minor offences. Soon after the Revolution it was looked upon with disfavor and was prohibited by direct legislation. In but one of the original thirteen Colonies (Delaware) has this existed as a punishment for crime within the last forty years; and, in none of the States since admitted to the Union, do I understand that flogging has constituted any part of their penal system.

In most of the Southern States it existed before the civil war, but as a form of punishment exclusively for slaves. In but one of the States, Delaware, was this form of punishment inflicted upon freemen, and the general animadversions upon the practice there shows that it was not only unusual, but that it was universally regarded as cruel and degrading. In England this form of punishment has been for many years abolished, and has only been recently revived and made applicable to a certain class of robberies.

Applying the rule suggested by Mr. Cooley, we find that in all the political communities with which our earlier law-makers were familiar, or whose legislation and usages they may be supposed to have had in view when drafting our State Constitution, flogging had either never existed or, having existed, had been discarded as cruel and degrading.

It was in the light of this, the almost uniform practice of the political communities represented by the men who adopted this Constitution, that this prohibition was enacted and, in my judgment, flogging, as a punishment for crime, was prohibited by it.

The question here considered was incidentally referred to by our own Supreme Court in the People vs. Antonio, 27 Cal. 404, and the decided intimation was against the constitutionality of such a law.

I am of opinion that the judgment under which the petitioner is now detained is unconstitutional and void, and that he is entitled to his discharge. It is so ordered.

THE MT. HAMILTON ROAD.

LICK TRUSTEES VS. WM. A. JANUARY, COUNTY TREASURER.

OPINION RENDERED IN FEBRUARY, 1877.

The plaintiffs, trustees of the James Lick Trust, presented to defendant, County Treasurer of Santa Clara County, certain warrants drawn by the auditor of Santa Clara County against the San Jose Township Fund and in favor of said plaintiffs; upon a contract entered into by said Board of Supervisors upon behalf of the County for the construction of the Mt. Hamilton Road (so-called).

The Treasurer refuses to pay these warrants and answers to the alternative writ of mandate that the Board of Supervisors were without authority to cause said road to be built, and that their action in the premises was illegal and the warrants in question invalid, and, for respondent it is contended that every step taken by the Board, from the inception to the completion of this work, must be in strict conformity to the law or that all their proceedings are void.

Upon the other hand it is contended for the plaintiffs that the County Treasurer cannot look beyond the face of the warrant presented to him, and, if it then appears that the warrant was drawn by the proper officer, and for obligations, it was in the power of the Board to create, he can inquire no further, but must register and pay the warrants in due course of procedure.

It would seem that any other rule than this last indicated would make the difficulties of the County Treasurer insurmountable. If, with every warrant presented showing upon its face an apparent legal obligation, he can be required to examine and determine whether this warrant is not something besides what it purports to be; if he can be compelled, in the proper discharge of his duties, to review the actions of the Board of Supervisors, and must determine, at his peril, whether this body has, in all respects, acted wisely and well before he can safely recognize its action, the duties and responsibilities of his position will be made onerous to a degree which must make their performance virtually impossible.

In my judgment, no such duties are imposed upon this officer. He must see that the warrant he is called upon to pay imparts upon its face a legal obligation against the County, one apparently within the power of the Supervisors to create, and further he must not inquire.

This view of the question disposes of the case, for the warrants in question do import a *prima facie* obligation against the County Treasurer, properly payable by the County Treasurer.

If in this view I am mistaken, if this conclusive effect be not given to apparently legal obligations, if inquiry may be made by judicial proceedings as to the legality of these acts of the Board of Supervisors, such inquiry must be limited to the question of jurisdiction. It cannot be contended for by counsel that the Court is to retrace, step by step, the proceedings of the Board and, with the first deviation from the strict letter, hold their action void. If a rule thus rigorous is to obtain, if every error committed by that body in its onerous and multifarious duties is thus far reaching in its operation, thus fatal in its consequences, it may safely be asserted that no prudent person would deal with a county; and whatever services it might require would be contracted for upon the basis of a desperate venture, most detrimental to the public interests.

In my opinion, these organizations do not occupy so unfortunate a position. If the judgments of Boards of Supervisors are not always infallible, neither are their errors always fatal; and many determinations which, perhaps, would not stand the test of direct impeachment, cannot be called in question by collateral attack. The rule is well settled that mere errors committed within an acquired jurisdiction must be questioned in a direct proceeding or not at all; while the want of jurisdiction or power to act at all is a fatal infirmity whenever and wherever it may present itself.

With this the distinction, it becomes important to ascertain what is wanting in jurisdiction in this case, and what is error in the exercise of jurisdiction. The first, if it exists, is fatal here and everywhere. The second cannot be objected to here or, collaterally, anywhere.

Says our Supreme Court: "Jurisdiction is the power to hear and determine and, as applied to a particular claim or controversy, to determine that controversy." C. P. R. R. vs. Placer Co., 32 Cal. 582; 34 Cal. 352; 43 Cal. 365.

"It is the power to hear and determine, or to hear without determining, or to determine without hearing." *Ex-parte* Bennett, 44 Cal. 84.

"And however the Board may have erred after its jurisdiction had once attached, such error does not affect its jurisdiction, cannot be corrected on certiorari, and is not open to collateral attack." 43 Cal. 365.

The jurisdiction facts in this case were two-fold:

First.—Jurisdiction of the general subject matter, *i.e.*, of the class of cases to which the case in hand belongs. This jurisdiction must be looked for in the Code, and is found in the Statute placing under their exclusive control all matters pertaining to public roads within the County.

Second.—Jurisdiction of the particular subject, *i.e.*, the road in question. This is acquired when a petition for the road, setting forth the necessary facts and signed by the requisite number of citizens is laid before them. From the filing of such petition the jurisdiction of the Board attaches. Before, they could proceed only as they were acted upon; thereafter, they move of their own volition and their power is jurisdiction. In their further action they appoint viewers, order surveys, institute inquiries as to necessity, practicability, cost, institute legal proceedings through the courts, let contracts and provide for payments; exercising in all these various proceedings powers ministerial, judicial, executive, with the broadest measure of discretion.

Such a power, which, exercised at any stage of this line of proceedings, may finally dispose of the entire question, of the whole subject of the inquiry, must be in the Board of Supervisors thus endowed, full jurisdiction, plenary power to hear and determine. If erroneously exercised, it may be corrected by a proper proceeding, but is invulnerable to collateral attack.

The objections urged by the defendant, in my opinion, all fall with the definition of errors within an acquired jurisdiction.

That the road is a public road, required by the public necessities; that the proper inquiries were made as to its purposes and its location; that the right of way has been secured; that the officers proceeded regularly in their actions after the reception of its petition, will all be presumed in a controversy like the present.

I find in the defendant's answer and defence presented, no sufficient objection to the relief applied for by plaintiff. Mandate accordingly.

SENTENCE OF M. H. ATHERTON.

DELIVERED IN MAY, 1877.

It is a very painful duty that the law imposes upon me to pronounce upon a man of your appearance and your age, the judgment that duty constrains me to declare. A summary of the case against you, I shall briefly give. It is this: That the deceased, Edgar Nay, in the Town of Santa Cruz, had been for a number of days, or weeks, in a condition of constant inebriety; that it had resulted in a state of moral, mental and almost physical helplessness; that while in this condition, he was thrown out from several saloons and treated with perfect contempt by all with whom he came in contact; that in this condition he presented himself in the saloon in which you were, and was expelled by the saloon-keeper; that he returned and engaged in an altercation with the bar-keeper about the circumstances of his expulsion; that in that altercation you intruded yourself, applying an opprobrious epithet to the deceased; that he resented it by some form of reply; that you immediately grappled him; that he was utterly helpless in your hands, and the result of a few moments' struggle was that he was on the floor absolutely under your control.

As your own witness, Mr. Brown, has testified, he was in such a condition that no rational man could " or should have feared a regiment like him," and, if his conduct had deserved chastisement, you could have administered it with perfect safety and he would have been compelled to submit, for he was as helpless in your hands as an infant. In this condition, thus powerless, thus helpless, you took a weapon, as deadly in appearance as it was in its results, and slew him at your feet.

When questioned about it, you expressed neither regret nor sorrow, but said, applying an opprobrious epithet to him, " no such man should insult you and live."

I have twice tried this case. The evidence is fully in my recollection, and I can find in the circumstances but a single element of palliation for your act; that is, you may not have known how deadly a deed you were committing.

Your only excuse is that at the time you were bewildered by that madness that comes from intemperance. This is the only element of palliation that can possibly exist. The jury in this case have recommended you to the mercy of the court. I always accept these recommendations with very great respect, and, coming from a jury that has fairly and thoroughly weighed the case, it has much consideration with me in guiding and influencing that discretion which the law has invested in me. I have stated here the facts in this case that it may appear that I have fully considered the testimony to which this kind recommendation refers, and I am constrained to say that the jury, in pronouncing a verdict for the inferior offence, have themselves exhausted the fountain of mercy.

In my judgment, whatever hereafter may be reserved to you, must be dependent upon your future conduct, upon your establishing to your future custodians that you are indeed a reformed and reclaimed man.

To give one of the lighter penalties which the law places in my discretion, would, in my judgment, be wholly disproportionate to the enormity of your crime. It must appear and it must be known that men cannot be slain with impunity whether they be drunk or sober; and, when a man presents himself in a Court of Justice with his hands stained with the blood, to authorize the court to consider legally such offence, it must appear clearly that this stain is not also upon his heart.

The judgment of this case considers the recommendation of the jury; it reviews the facts of the case and, repeating, as I do, that your future hope for pardon or for leniency must be dependent upon your future conduct, the judgment of the court is announced. It is that you be imprisoned in the State Prison for a term of twenty-five years.

SENTENCE OF WILLIAM PARKER.

DELIVERED IN SEPTEMBER, 1877.

The statement made by your counsel of the circumstances connected with this homicide is substantially correct. They were developed upon the trial about in the order and in the character stated. The evidence shows that you went to this saloon, were introduced to the bar-keeper, took a number of drinks at the bar, and engaged in a game of cards for liquors which were frequently participated in, as the determination of the game called for them; that yourself and the party whom you slew were in a state of at least partial intoxication; that this was the condition of things when words led to an altercation, the consequences of which was that the deceased was slain by you. Whether there was any attempted attack by the deceased, McGinley, upon yourself, was a matter that was submitted to the jury. Their verdict may, perhaps, indicate that they thought he was making some hostile demonstration upon you. Be that as it may, the facts of the case that are not disputed are, that an altercation which upon both sides has its origin in the inebriated condition of the parties, had arisen between yourself and deceased.

Upon the case as presented, the jury most mercifully found that the homicide which resulted at your hands was only manslaughter. It was a humane consideration of your case and one in which the court, as an individual, shares: one in which the jury as well as the court may well believe, and well assume that crimes which result either from the madness of passion or from short-lived drunkenness are not to be measured with the same degree of severity with those which come with cold-blooded calculation and reflection. The jury doubtless took into consideration your youth, the special circumstances of this homicide, and they awarded to you a measure of mercy as kind toward you as it was considerate of the jury. If they erred in so doing it was an error in which I am willing to share and accept the responsibility of giving you at least another opportunity for a useful life. If warning of this crime and this punishment be thrown away upon you, it is because you will not accept its teachings, and not because the jury and the court have not been merciful towards you. If your example shall not be lost upon others; if the lesson, of which you stand here the illustration, shall warn others of your years and your situation, of the perils of the course which you have been pursuing, your example will not have been without benefit. The judgment that the court pronounces you are able yourself to shorten. Your good behavior in the penetentiary will reduce the term of your imprisonment. It will give you abundance of opportunity for reflection, to consider the evils and the pitfalls that you have left behind you; and, if there is a cloud over your young life, there will be still years left in which you may remove and dissipate it. In this view, with this hope, the judgment of the court is that you be imprisoned in the State Prison for the term of seven years.

CASE OF CARL KAESWURM.

MOTION TO DISMISS CHARGE OF MANSLAUGHTER.

DECISION RENDERED IN MAY, 1878.

The right of the District Attorney, as the law officer of the County, to dismiss a case for the reason above assigned, is under the control of the Court, and, when a case has been once tried, and the facts are within the knowledge of the Court, the motion should commend itself to the judgment of the Court.

In the present case, the defendant is indicted for manslaughter in carelessly administering to one James Webster an excessive dose of morphine, from the effects of which he died.

The case, as presented, showed substantially that the deceased was suffering from the effects of a fracture of the thigh bone, and that, to relieve the pain from which he was suffering, the defendant administered to him a dose of morphine. That under its influence he went into a profound sleep or stupor. That other physicians were summoned and by their efforts and the remedies they applied, he was brought to a partial consciousness, made his will, conversed intelligently, and was apparently relieved from the dangerous consequences of the morphine. That eighty-one hours after the morphine was administered, he died. That a post mortem examination disclosed the presence of a "fibrine blood clot" in the aorta, which the medical witnesses argue was the immediate cause of death.

Upon the other propositions there was a direct conflict in the opinions of the medical gentlemen who were examined. One portion testifying with much confidence that at so long an interval as eighty hours the effects of the morphine must have been wholly dissipated, and that the blood clot was more likely to have resulted from the bruised and fractured limb of the deceased than from the effects of the morphine; or, that it might have been induced by the improper remedies applied by other physicians as antidotes for the morphine. The other witnesses were equally confident that the excessive dose of morphine was the direct cause of the blood clot, and that the effects of the morphine were probably not dissipated at the time of his death. The defendant himself testified to the quantity of morphine given and his statement as to the dose makes it less than the amount usually found dangerous.

Upon these conflicting statements and theories, the case was submitted to the jury. They were unable to agree and it is understood that a majority were for acquittal.

Upon these conflicting and complicated propositions it is difficult to see that a reasonable doubt as to some essential fact will not always be entertained. The defendant's action was no more than negligence and ignorance; it was devoid of malice and intended for the best. That upon these facts and under these circumstances, a jury will ever agree to convict the defendant of felony seems to me highly improbable, and I think the motion of the District Attorney exhibits a proper regard both for the ends of justice and the interests of the community.

The motion to dismiss is granted.

The case above referred to was one of considerable local interest. Kaeswurm had refused to take out a certificate from the State Medical Board and was practising "irregularly."

The County Medical Society sought to make an example of him and was giving its influence to the prosecution. The object was to demonstrate that a person practising medicine out of the orthodox method was a dangerous element in the community. Judge Belden, in his charge to the jury, defined the responsibility of physicians under the law, as follows:

In all cases the physician is bound to exercise reasonable skill and prudence in the treatment of his patients, and is civilly liable for any injuries that may result from carelessness, ignorance or inattention. But, to render him criminally amenable, the negligence must be gross, must be a violation or disregard of the ordinary rules and universal precautions that obtain in his profession. He is not required to possess nor to exercise the highest order of judgment, skill or discretion known to his profession. The measure of skill and dilligence required at his hands is that which an ordinarily instructed and reasonably skillful member of the profession would have exercised under similar circumstances. In the diligent and proper discharge of his duties, he must know the character and understand the effect of the remedies in general use, which he is applying. In the prescription of medicines, which may prove dangerous or deadly, he is bound to know their general potency and their usual effect upon ordinary constitutions; and, if through ignorance or inattention, he administers an ordinary drug, of a well-known dangerous and deadly character, in such manner or quantity as would, under similar circumstances, generally cause death, such an act may well be considered as such gross and reprehensible negligence as should render the physician criminally responsible.

But, while the physician may well be held thus accountable for the exercise of due caution and skill upon the apparent condition presented by his patient, he will not be held criminally accountable for the results of those obscure, exceptional or extraordinary conditions, whose presence a reasonably informed practitioner would not have anticipated and whose existence made that dangerous or fatal which probably would not otherwise have so proved.

He is bound to see and know what a reasonably skillful practitioner would have seen and would have known, and to take such measures and apply such remedies as such practitioner would have employed."

SANTA CRUZ TURNPIKE vs. JOHN SHEPHERD ET AL.

DECISION RENDERED IN JANUARY, 1878.

The plaintiff files this bill to restrain certain of the defendants named from tearing down and removing a certain toll gate or bar by it erected upon the line of the road, and also to enjoin certain others of the defendants from travelling upon said road without paying the tolls required by plaintiff.

The bill, in which this relief is sought, sets forth that plaintiff was legally incorporated under the law of the State upon the 16th day of November, 1857; that the duration of the term for which it was so incorporated was twenty years; that under and by virtue of said incorporation it constructed and has ever since maintained and operated said road as a turnpike road. That thereafter and before the expiration of the term for which plaintiff was originally incorporated, and under and by virtue of a provision of the statute thereafter enacted and then in force, said plaintiff did, upon the 9th of December, 1876, elect, and did upon the 18th day of January, 1877, file in the office of the County Clerk of Santa Clara County, a certificate of its intention to extend its corporate existence for the further period of thirty years, and did, from the 20th of January, 1877, cause a certified copy of such certificate of intention to be filed in the office of the Secretary of State. That from the date of such original incorporation down to the present time, said plaintiff has, as such corporation, elected its officers, kept a public place of business, operated said road, and generally exercised all the franchises and functions of such corporation. That upon the 19th day of November, 1877, said corporation was so existing and acting; that by order of the Board of Supervisors of Santa Clara County, it was then authorized to collect tolls at a prescribed rate from persons travelling over its said road.

That upon that day certain of the defendants tore down and removed plaintiff's toll gate, and did prevent and threaten to prevent plaintiff from rebuilding the same; that others of said defendants travel over said road and refuse to pay to plaintiff the toll required.

Upon this bill, an order to show cause issued, and has been served upon defendants.

They show cause by filing an affidavit in which they deny most of the averments of the plaintiff's bill as to the steps taken and proceedings through which it was originally incorporated or by which its corporate existence was extended. They do not deny that the plaintiff is apparently in good faith asserting itself to be a corporation, and that its action is in the exercise of rights asserted as such corporation.

Can the defendants in this form of proceeding as justifying a mere trespass, be heard to question the existence of the corporation of plaintiff?

That such corporate existence could not be collaterally called in question was well established at common law and is also a provision of the code, says the statute: "Provided that the question of the due incorporation of any company, claiming in good faith to be a corporation under the law of this State and doing business as such corporation, or of its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party; but such inquiry may be had at the suit of the State on information of the Attorney-General." [Civil Code, Sec. 358.]

The rule above stated simply repeats in an enactment the substance of an unbroken line of decisions and would seem to control the present case. It is claimed, however, upon the part of the defendants, that the case of "Oroville R. R. Co. vs. Plumas Co." 37 Cal., has introduced a new rule, and that upon the authority of that case, these defendants can put in issue the existence of the corporation. I do not read that case as changing in the least the general rule. The proceeding was upon mandamus to compel Plumas County to issue a large amount of County bonds in the form of a subsidy to a railroad corporation, and it appeared that the corporation was neither doing business as a corporation, nor was it claiming in good faith to be a corporation. The defendant claimed, and the Court seemed to be of opinion, that the only corporate action it was exhibiting or proposed to exercise was as the recipient of a very large amount of County obligations. Under these circumstances the Court held that it was not doing business as a corporation and permitted the defendant to establish that fact. The "Stockton Road Co. vs. The Copperopolis R. R. Co.," was decided long after, and the case from 37 Cal. was relied upon as authority for a similar claim to that here asserted. The plaintiff claimed to be a corporation and showed that it was acting as such; that the defendant had entered upon its property, and it prayed restitution and damages. The defendant denied the corporate capacity of plaintiff and, at the trial, plaintiff was non-suited. Upon appeal, said the Supreme Court: "The plaintiff was a corporation *de facto* at all events and as such was in the undisputed possession and control of the roadway. * * * * * In this condition of things the defendant entered upon the road along Weber Avenue and took it into possession and now undertakes to defend this action on the ground that the plaintiff was not a corporation *de jure*, nor *de jure* entitled to the franchise of which it has by this means been deprived. We think that under such circumstances the title of the plaintiff cannot be inquired into by the defendant who is a mere intruder upon the Weber Avenue Road and that, until ousted by some direct proceeding instituted for that purpose, its possession cannot be rightfully disturbed." This case seems to me to be upon all-fours with the case at bar. The plaintiff had been for twenty years a corporation, exercising in good faith this franchise, and in good faith claims, at least, to have extended by proper proceedings its corporate existence. Should this Court in an action for trespass, enter upon this inquiry as to its *de jure* existence? It has been often and well said that corporations are not formed solely or principally for the advantage of the corporators. It is principally, in theory at least, assumed that for the special privileges granted, corresponding benefits will result to the public. It is for the public benefit they are created, in the public interest they are assumed to be regulated, and as it is the people in the sovereign and political capacity that have called these organizations into being, clothing them with certain of their own special attributes and controlling them by direct political intervention. Accordingly that it is the Sovereign alone who will be permitted to question the fact of their being. Such is the principle, too ancient, too uniform, too well established to require any citation of authorities in its support.

It is suggested, however, that the rule has no application when the term of the corporate existence as fixed by the charter has actually expired. Whether any different rule should obtain in such a case, it is not necessary to here determine. It is evident from an inspection of the statute that a corporation might extend the terms of its existence by taking the steps indicated by the statute. From plaintiff's bill it is very clear that the plaintiff has, in good faith, attempted to bring itself within this provision. If anything has prevented the successful accomplishment of this purpose it is an irregularity, or, if more, if such a failure or defect as would be fatal upon an inquiry by the people, it does not and cannot impeach the good faith of the plaintiff's action and of its exercise of the powers it might have legally acquired and does apparently possess.

In my opinion the necessary party—the one most interested in the question—is not before the Court. It is the people as a body politic that should prosecute this action; and were this Court, in the present proceeding, to determine that the plaintiff still existed as a corporation, it would not prevent the Attorney-General at once filing a bill re-opening the entire question. This view of the case disposes of the principal question presented upon the argument. If the plaintiff, as a *de facto* corporation, had a right to maintain a toll-gate, the defendants cannot treat such barrier as a nuisance, and of their own motion abate the same.

The defendants will be enjoined from disturbing or in any way interfering with plaintiff's maintenance of its toll-gate.

The plaintiff further prays that a large number of defendants may be restrained and enjoined from travelling upon the road without payment of the tolls as fixed by the Board of Supervisors.

It is a familiar law that a Court of Equity does not interpose with the remedial power where a plain and adequate legal remedy exists. The remedy in this case is more than ample, it is plenary. The plaintiff may recover from every person who passes without paying toll, not merely the sum fixed by the rate, but the further sum of twenty-five dollars for every such infraction. The defendants are not trespassers in passing over plaintiff's road. It is their right to so pass, and it is the duty of plaintiff to afford them every facility for so doing. If they do not pay the toll demanded it is a violation of an obligation, not a trespass, and for the violation plaintiff has ample redress. If the remedy be not sufficient, or its enforcement proves vexatious, a Court of Equity would hardly undertake the duties of a toll collector, even though it could enforce its requirements by the summary process of procedure for contempt.

The injunction prayed for, restraining defendants from disturbing or interfering with the toll gate of plaintiff, is granted; plaintiff to give bond in the sum of $500. So much of the prayer of the bill as asks that parties be required to pay, or restrained from travelling upon the road, is denied.

The foregoing restraining order having been violated and the matter brought to the attention of Judge Belden, the following order was made, January 26th, 1878.

I do not agree with Judge Archer that this is merely a technical violation of the order of the Court. If the Court made any order whatever in the matter, it was that that barrier, that toll gate be not disturbed pending these proceedings. It was the apparent purpose of these parties to disturb that barrier and remove that toll gate. Its maintenance was all that the injunction called for, was all that the restraining order imposed. Its removal was all that these parties undertook. It was exactly what they accomplished. The substance, the entire body of the order of injunction was violated in fact, whether an order of Court was violated in intention or not, I have to say to these parties to this controversy, as I have not the slightest doubt in the world that their counsel has already informed them, that whether the action of this Court is erroneous or otherwise, it will be maintained until some higher Court correct it or until, in some proper proceeding, it can itself ascertain the error and apply the correction. It is a matter of perfect indifference to me whether there be one or one thousand persons that array themselves against the order of the Court. The Court sits here and endeavors, at least, as the representative of the law, to administer it. It will enforce its orders to the best of its ability. It will make such orders to the best of its judgment, and whatever consequences may be attached to those that violate them, they are self-inviting and will have to be sustained. In asking these questions that I have propounded to the respondents who have been called here, my purpose was to find some responsible, intelligent man who had been the moving cause in this action in violating the order of the Court; some person who could appreciate his position and properly appreciate the order which the Court will administer to him. Had such a discovery resulted, I should certainly have taken the responsibility of making him an example for the benefit of, perhaps, misguided and less informed men, who seem to have been impelled by some other and more intelligent power. I do not propose to visit severe penalties upon men who neither appreciate their position nor comprehend the order of the Court or the consequences they are inviting upon themselves. If they acted under a misapprehension of the order of the Court, it perhaps exonerates them from the moral consequences of such violation; but a rule that permits parties to set at defiance the orders of the Court or the laws of the land in any form, and then to plead ignorance in extenuation of the act, simply sets all law at defiance and puts in the mouth of every man, however responsible or irresponsible he may be, an excuse which would make the orders of the Court virtually nugatory. In this case, one of the respondents, Mr. Chase, appeared to have nothing to do with the proceedings. As to him the order is discharged. As to those other parties the punishment awarded is simply the nominal one of making a *pro rata* distribution of the costs of this action. Upon the payment of those costs, to be distributed between the parties who appeared and responded to this order, they will be discharged. They are discharged upon the further notice, and they can inform their associates, or those that may be concerned in this controversy, that all persons aware that the Court has made an injunction or order of this character, who violate it, are parties to the proceeding, whether their names are in the paper or not; and those who, knowing there is an order prohibiting such a course, proceed in violation of that order, render themselves amenable to this summary process, and, upon a repetition of such action, the parties being brought before the Court, they may expect no leniency whatever. The Court will enforce its order, and enforce it by as stringent processes as the law places under its control.

CHAPTER VIII.

TOWN OF SANTA CLARA vs. SANG KEE.

DECISION RENDERED IN JULY, 1878.

[The ordinance referred to in this decision was passed during the great anti Chinese excitement, and was designed to drive the Chinese laundries from the Town of Santa Clara].

THIS action is brought by the plaintiff to recover from the defendant the sum of $60.00 as three months' license tax imposed at the rate of $20.00 per month by the Town of Santa Clara upon all persons engaged in the laundry business within said town. The facts of this case show that this tax bears no proportion to the other municipal charges imposed by said town, but is very largely in excess of any other license imposed by that municipality; and it further appears that it is over twenty times the tax before imposed by the town upon this business. It further appears that the ordinance does not undertake to apportion this burthen to the amount of business transacted, labor performed or receipts, but levies this charge alike upon laundries employing one and those employing many laborers. It is unnecessary to review the many adjudications upon the questions here involved. The cases are collated in "Dillon on Municipal Corporations" and "Cooley upon Taxation," and the rules indicated by these eminent commentators were emphatically approved and applied by our own Supreme Court in "*Ex-parte* Frank upon Habeas Corpus," not yet reported. (52 Cal. 606.)

Those cases are conclusive of the case at bar and are decisive of many of the questions here argued, and determine:

First.--That a municipal corporation may by ordinance impose a charge as a matter of revenue upon business prosecuted within its corporate limits.

Second.—That an action like the present may be maintained for its collection. But while this case at once upholds the power and the mode of its enforcement, it also establishes the rules and restrictions by which this power must be governed and guided. Those rules would hardly seem to require either precedent or argument for their support. As stated in "*Ex-parte* Frank," citing Dillon's work on elementary law, these rules are: "That such tax be not unreasonable, oppressive or unjust, partial or in restraint of trade." To which restrictions may well be added that it should not be in restraint of, or operate oppressively upon the natural right of all to labor. Upon the ground that the San Francisco ordinance was in derogation of these fundamental principles, it was adjudged by the Supreme Court that the same was absolutely void. All the objections presented in the case of "*Ex-parte* Frank," with many more, are found in the Santa Clara ordinance now under consideration. Upon the authority of this case and of the cases cited, this ordinance must be adjudged void, and judgment must be for the defendant.

DAY vs. PRINDLE.

DECISION RENDERED IN AUGUST, 1878.

Upon an application to fix the fees of a keeper in attachment.

The furniture, carpets etc., in the residence of the defendant was taken by the sheriff under process in an attachment suit. Under instructions from the plaintiff, the sheriff placed a keeper in the building to take charge of the property. The first keeper was upon the premises seventy-eight days and was boarded and lodged by the defendant at the house. This keeper withdrew and another took charge, who remained in possession thirty-three days, when a bond was given and the attachment released. Judgment was rendered in the general case in favor of the plaintiff.

It is contended by the defendant that this was not a proper case for the appointment of a keeper, but that the sheriff should have removed and stored the furniture.

Second, that the charge for the keeper's services—$3.00 per day—is extravagant and more than should be allowed.

The question whether the sheriff shall remove and store property taken under attachment, or shall place a keeper in charge of the same,is one of sound discretion, to be determined by the amount, character and situation of the property. If there was but a small amount of property so situated that it could be readily removed without inconvenience, it should be done. In the present case, a large amount of valuable and expensive furniture was at the residence of the defendant and in use by his family. To have removed it would have been very detrimental to the furniture and a very great inconvenience to the family. The sheriff exercised a sound discretion in placing a keeper in charge of the property.

As to the compensation of the keeper, the sheriff is to exercise the same sound discretion. It is his duty to safely keep the property, but he is neither the insurer nor guarantor of the goods seized. He is made by law the bailee for both parties. To hold the goods for plaintiff, if they shall be required for the satisfaction of any judgment that may by recovered; to return them to defendant, if such be the final disposition ordered. In so keeping the property the measure of diligence required is reasonable prudence and attention. To this extent, he is responsible and nothing beyond.

If the assistance of subordinates is required, he may select such as the nature of the duties requires, and will be compensated to the extent that this character of services merits. He will not be expected to employ men of extraordinary capacity, and whose services may command special and large compensation for duties that may be equally well performed by less experienced agents. He is neither to speculate on the duties required by the plaintiff nor the necessities of the defendant. He is to consider the character, amount and position of the property, the responsibility and duties of the agent in charge, and is to see that a person of sufficient capacity and character to fully discharge those duties is placed in charge. If the position calls for the exercise of judgment, experience or discretion, these qualities should be secured and a corresponding compensation will be allowed.

When the duties and services are simply those of a watchman, to see that the furniture of a dwelling house is not surreptitiously removed, a very ordinary measure of capacity will be found sufficient. In my opinion, this should be the rule for the selection of such agents; "for what could a citizen requiring agents to render such services as the keeper performs in a given case, hire men fully qualified and competent to discharge such duties?"

This, as a rule, remits the sheriff to his true position of agent for both the parties, exercising a sound discretion for their interests, as well as for his own protection. The rule as to compensation may have a further qualification in the length of time in which the keeper is so engaged. A party placed in the position for a temporary purpose and a brief period, being entitled to a larger proportionate compensation than when the engagement is long continued.

In the present case, for the services of the keeper who was boarded and lodged by the defendant, the allowance will be one dollar per day—seventy-eight dollars.

The keeper who, while in charge, boarded himself, will be allowed two dollars per day—sixty-six dollars.

COOPERS vs. MAYOR AND COMMON COUNCIL OF THE CITY OF SAN JOSE.

DECISION RENDERED IN NOVEMBER, 1878.

By statute of 1877-8, the Mayor and Council of the City of San Jose were empowered to open Market Street through Market Plaza. By the second section of the Act, it was provided that the Mayor and Common Council "may sell the ground of the Plaza fronting on either side of said street to parties who own lands around said Plaza," who were to have the preference as purchasers of the same.

Sections second and third provided for surveys, applications to purchase, valuation of lands and appropriation of the proceeds of sale.

Section four provides that if those fronting upon these streets shall not make application to purchase these lands within six months from the date of the passage of the Act, then any party may make application and shall be entitled to purchase the same.

In pursuance of the provisions of this Act, Market Street was duly laid out through Market Plaza and made a public street.

This plaintiff is the owner of land fronting upon said street. Within the time prescribed by this Act, he made application to the Mayor and Common Council to be permitted to purchase the land fronting upon his lot, and requested them to fix a value upon the same.

This application is denied by the Mayor and Common Council and plaintiff now applies for a writ of mandate upon these officials. The principal questions presented in this case are, what provisions in this Act are directory and what mandatory; a question somewhat complicated by the connection in which the verbs "may" and "shall" are employed in the several sections of the enactment.

In section one, the Mayor and Common Council are "authorized and empowered," etc. In section two, the Mayor and Common Council "may sell," etc. In section four, any other party "may" become a purchaser and "shall" be entitled to a conveyance.

In my opinion, the first section left the matter of opening this street in the discretion of the Mayor and Common Council. The language used was permissive, not mandatory. The subject matter was very properly calling for the exercise of the discretion of the city officials, *i. e.*, the question of changing a public square into a public street. But, while this question was left to the discretion of the officials, that discretion, when once exercised, was, in its exercise, exhausted and could only be reviewed or revoked by some proper action taken to retain the subject matter for further consideration.

No such action appears to have been taken. And the next question is as to the rights of the parties upon this, as an established street.

The second section provides that the Mayor and Common Council may sell to the adjoining proprietors and that they are to be treated as preferred applicants.

The fourth section, that, in case these preferred parties shall not apply, any other person may make application and "shall" receive a conveyance.

While it is true that in statutes the verb "may" receives the same construction as the verb "shall," as being a word of command, it is equally true that "shall" is rarely construed as a word of mere permission. That, unless the contrary appears, or the clear purport of the Act so requires, statutes are construed as commands. Applying this rule to the two sections, and to the two classes of purchasers here provided for; in section two, we have a preferred class who may become purchasers at the will of the officials. In section four, the postponed class are given the absolute right to demand. The class that is preferred as to right, is postponed as to privilege, and the class postponed as to right is preferred as to privilege. Reading the whole Act together and considering the apparent object in view, such a construction can neither represent the purpose of the Legislature or receive the sanction of the Court. I am satisfied as to both classes of applicants; the law is alike mandatory and that the right to demand the valuation of these lands became absolute upon the opening of this as a public street.

It was suggested upon the argument, that, as the valuation of these lands was in the discretion of the Mayor and Common Council, and, as these officials could, by fixing an extravagant and exorbitant price, evade the purposes of the law and the orders of the Court, this Court would not go through the vain form of ordering what might be so easily avoided.

Could this Court know that this would be the course pursued by these officials, and that its order could thus be successfully evaded, that fact would furnish no reason why the judgment here pronounced should not conform to the duties here imposed. Nor will the Court assume that the course suggested could be possible upon the part of the City officials. The obligation in which this statute was enacted, and is here interpreted, rests with the same force and solemnity upon those who are called to execute its provisions. That duty is not discharged by either subterfuge or evasion, nor will the Court imagine that either will be resorted to. It assumes that the provisions of this statute, which calls for the exercise of the discretion of the City officials, in this as in all other duties, will be exercised according to the intendment and interpretation of the law.

SAUNDERS ET AL. vs. KITCHEN ET AL.

DECISION RENDERED IN DECEMBER, 1878.

Plaintiff claims the right to an injunction in this case upon three principal grounds:

First.—That the road constructed by the defendant was, in fact, but the restoration or repair of a former public road.

Second.—That they have abandoned whatever rights they may have originally possessed in said road.

Third.—There may also be added that the defendants are not the owners of the whole of the tract over which the route of this road extended.

Considering these propositions in the order in which they are stated:

The testimony of plaintiff certainly did not tend to show that defendants either adapted or repaired an ancient road. If it establishes any conjunction with a former road, it was that the work of the defendants destroyed it and made it wholly impassable. For this the defendants may have been liable in damages, but they do not forfeit their own road by obstructing another one.

Second.—That defendants have dedicated this road to the public; the rule is well established that dedication must be clear, positive and unequivocal; that occasional concessions or privileges as a matter of favor or by accommodation, not only do not constitute a dedication, but such concessions and permissions, asserting, as they do, the right to concede and permit, are proofs that there was no dedication. In this case, the evidence is conclusive that the permission was only granted, and the course of the defendants in refusing to permit the road to be travelled was often most ungracious and churlish. The proof is conclusive, not only that the defendants did not intend the public should own the road, but they were equally sedulous that the citizens should not use it.

The evidence as to abandonment is supported and met by the same facts and evidence that is presented as to dedication. The proof as to the abandonment, say all the cases, must be clear and conclusive. It must indicate a purpose not merely to forsake and abandon, but it must not be coupled with any purpose that any other person shall possess. Where either dedication or abandonment of this road can be found in the conduct of these defendants, I fail to see.

A more ungracious and ungenerous assertion and exercise of private and exclusive ownership cannot well be imagined. That the parties employed at the mill escaped payment of the road tax by representing to the assessor that they were permitted to work it out in this road, is very probable. It was not shown that this representation was made by any of the owners, and the superintendent of the mill had hardly authority by virtue of his position to dedicate away a road of the company that had cost over ten thousand dollars, by such declaration. That the whole of this road is not upon the lands of the defendants does not affect this question. It is not upon the lands of the plaintiff that it is interrupted, and, when those, over whose lands it does pass, complain, it will be time enough to consider this objection.

As the case stands, it is the defendant obstructing the passage over a private road, built by itself for its private and individual use, and upon lands that it either owns or has acquired this easement.

Upon the case made, the defendant has an undoubted right to do as it pleases with a road it has so constructed and controlled.

Motion to show cause is discharged and injunction denied. Costs to defendant.

CITY OF SAN JOSE vs. C. FREYSCHLAG.

CHARGE TO JURY DELIVERED IN JANUARY, 1879.

The question as to Mr. Freyschlag is principally one of dedication. He is not entitled to compensation from the public for a street which he has already given to the public. If he has given it to the public of his own liberality, or for his own individual purposes, that ends his claim to compensation for that street, except so far as nominal compensation is concerned. The city is not obliged to pay him for that which he has already dedicated or conceded to it as a public thoroughfare for public use. The facts which constitute a dedication are varied. Sometimes it is determined by the intention of the parties to dedicate and is a question of purpose—what he intends. Or he may dedicate it by an act, a public fact, such as selling the lots and blocks with the streets designated, or by selling lots fronting upon that street. Or he may dedicate it by conveyance, by deeds and by description upon the public record describing it as a street. Or he may dedicate it by opening it to the public as a thoroughfare and permitting them to travel over it for a given length of time. Any or all of these circumstances may constitute proof of dedication. It has been argued before you here that the dedication in question would be limited to giving a good outlet to the party who purchased a lot upon a street. I instruct you that that is not the law; that a party purchasing a lot upon a street, designated upon a map as such, whether he have a lot or not on all the streets that may be designated upon that map, yet has a right to consider the street designated upon such a map upon which he finds it as dedicated to such an extent as may affect either its convenience or its value in the present or in the prospective; that his right to a street is not limited to a *cul de sac* or pocket, but he has a right to it as a public avenue which may invite the neighborhood, and which may open up the locality to settlement, and which, as a consequence of its use, may make his purchase more valuable. Should his purchase be a corner lot, he may very well have a right to claim the two streets which give his lot a special value as a corner. And if the party who had sold to another by map upon which this would be represented as a corner lot, can withdraw that value and make it simply a line of a general street, he would materially diminish the value to his ground. I instruct you, therefore, that a street is a thoroughfare for such distance and in such manner as would materially affect the convenience or value of the property, as a purchase it may be regarded as dedicated to the extent to which it is indicated upon a map or by the declarations of agents made at the time of and as a part of the sale.

SENTENCE OF CHARLES COLBY.

RENDERED JUNE, 1879.

The verdict rendered by the jury in this case leaves to the Court but a single duty, which is declaring the judgment and fixing the time of its execution. I deem it, however, befitting this occasion that the officer who speaks the voice and pronounces the solemn mandate of the law, should make public those reasons which justify its judgment, and fully establish that neither prejudice nor passion have influenced this verdict, and that it is in no spirit of vengeance or resentment that the law, through its ministers, now declares its last and most solemn penalty.

The testimony in this case shows that between yourself and a co-employee of the Pacific Ocean House, a trifling altercation in words had arisen; that the deceased laid hold of you and raised you from the chair on which you were sitting, and offered to go with you out of doors, and then to fight you. It did not appear that you received any injury from this act; it was no more than a trifling assault—scarcely a trespass—and would have been amply resented by a blow. It was shown that after this occurred you left the room and in a few moments returned armed with a pistol. The deceased had resumed his employment, and without further provocation, without further warning or intimation, you fired your pistol at his head, and he fell lifeless at your feet. Your purpose accomplished you left the place, repaired immediately to a peace officer and surrendered yourself into his custody.

The counsel that so earnestly and ably advocated your case, very properly judged that for an act thus provoked, thus executed and thus characterized, there could be but one excuse, but one extenuation—that so fell, so fatal a deed of a reasoning and consenting mind, and that you were, in fact, insane, and therefore irresponsible.

Upon that issue your case was fully and fairly submitted to the jury, long and patiently as became their solemn duty the jury deliberated; the single proposition upon which they doubted being the question of death or of imprisonment for life. Their verdict has determined your fate, and the single penalty that can be adjudged is death.

Upon the testimony in this case, upon an act so deliberately conceived, so coolly, so cruelly executed, there can be neither cavil nor question as to your consciousness of the crime you were committing, or of the justice of the verdict and of the judgment that must follow upon it. In that judgment and its dread execution present contrition cannot avail.

The law does not look for reformation in your future; in your fate there it only one expiation for your crime, the warning and example that your offence and its punishment may afford to others—teaching, as it impressively does, that although the shield of Justice may not always avert the deed of violence, her sword will bring on the offender swift and certain retribution. With the law that visits upon such offences a commensurate punishment there can be neither cavil nor question. That justice that punishes murder with death is as ancient as civilization; it stood for all time the barrier between the passions of the violent and the security of the peaceful; to reasoning men it teaches that reason is given to enable them to restrain the madness and the violence of passion; it comes to us with the wisdom of all codes, with the gathered experience of the ages, no less with the universal consent of all men than in the language of Holy Writ has it ever spoken, does it here repeat: "Whoso sheddeth man's blood, by man shall his blood be shed." There is another view of this case which it may not be improper to suggest.

The atrocity of this crime might well have aroused a high degree of public resentment, and to a community, prone, perhaps, to deem only that justice complete which was swift as well as certain, might have substituted the violence of public passion for the calm, the deliberate, the solemn action of the law.

In the wisdom that has stayed the hand of violence, that has left the Court this grave inquiry that the tribunals of the county can alone properly consider, I welcome the public sentiment that recognizes in the law created for the protection of all, the sufficient and only means for the punishment of any. But it remains for me to pronounce the solemn judgment which the law prescribes and which your offence merits:

That judgment is death; that you be by the sheriff of the County of Santa Cruz kept in some secure place until Friday, August 15th, 1879; that upon that day, between the hours of ten and four, you be by him hanged by the neck until you are dead, and may God in His goodness, have mercy on your soul.

PEOPLE vs. GEORGE W. CARLETON.

CHARGE TO JURY. DELIVERED IN 1880.

Gentlemen of the Jury.—The defendant, George W. Carleton, is indicted by the Grand Jury of the county of San Benito for the crime of manslaughter, alleged to have been committed at the town of Hollister upon the 12th day of February, 1880, in the felonious killing of one S. H. Brummett. Manslaughter is defined by our Statute to be "the unlawful killing of a human being without malice. It is of two kinds: First, voluntary, upon a sudden quarrel, or heat of passion; second, involuntary in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection." Independent of these statutory definitions it may be stated generally that any killing of one human being by another, without malice, and where such killing is not justified or excused by the law, would be manslaughter in the slayer. It is admitted by the defendant, Carleton, that he fired the fatal shot by which Brummett came to his death; but it was claimed that it was fired in necessary self-defence, and to repel a violent and dangerous assault which it is alleged the deceased was about to make on the defendant. The Statute declares "homicide justifiable when committed in resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person." To justify the slaying upon the ground of necessary self-defence, it must appear "that there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished. A bare fear of the commission of any of the offences above mentioned, to prevent which the homicide may be lawfully committed, will not justify it; but the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone." The right of a party not himself in the wrong, when violently assailed by another, to protect himself, is a law of nature more ancient than human enactment, and recognized in all systems of social organization. It assumes an emergency so sudden, a force so violent, that the general law must prove inadequate to protect. When such an exigency arises, the natural law, the instinct and the right of self-preservation, asserts itself, and the man thus periled may resist force by force, and measure to himself full protection, even to the extent, if necessary, of slaying his assailant. This right, broad and universal as it is, carries with it conditions inseparable from its justifiable exercise. These are that the party thus slaying was not himself the first aggressor, or, if such assailant, that he was really and in good faith endeavoring to decline any further struggle before the homicide was committed; second, that the assault of which he was the object was accompanied by some overt act, some physical demonstration, indicative of serious bodily injury to himself. Thus, for a party to avow a purpose of immediately killing another without further demonstration, will not justify the party threatened in assuming from such threat a peril which will excuse him in slaying the person so threatening. But if, with that threat, or immediately following it, he attempt to strike a blow with a deadly or dangerous weapon, or to draw a pistol or knife as if for the purpose of carrying the threat into immediate execution, such an attempt may be considered an overt act, so endangering the party menaced thereby that he may act upon it as creating a present peril which may be met and repelled by such force and means as may be necessary to the complete protection of the party thus endangered. There must be a necessity, real or apparent, for the killing. That no other course is reasonably available. As the books express it, the party must be driven to the wall. Between his duty to flee and his right to kill, he must fly. But by this is not meant that a party must always retreat, or even attempt flight. The circumstances of the attack may be such, the weapon with which he is menaced of such a character, that an attempt at retreat might but increase his peril. So where the weapon with which a party is threatened is a dangerous missile, or a firearm, he may be considered "driven to the wall," when within the reach or the range of such weapon. By "retreating to the wall," is meant that the party must avail himself of any apparent means of escape by which the danger may be averted, and the necessity of slaying his adversary avoided. But if the attack be violent and impetuous, the weapon employed deadly and far-reaching, the party thus endangered need not aggravate his peril by attempting a hazardous and useless flight. He is at the wall, and may repel his assailant with whatever of force is requisite to his own safety. It is not essential to this defence that the danger upon which the party thus acts should be real. It is sufficient that it be an apparent or seeming peril. Upon such appearances the party may act, and will be justified, though it should thereafter be shown that these appearances were illusory, and that there was in fact no actual danger. The fact that the defendant actually believed himself in such danger is not, however, sufficient, nor will such mere belief, however honestly entertained, justify a homicide. The temper, the timidity, the excitement of a party may induce an unwarranted though sincere belief as to his position and his peril. The test is not the opinion of the party, well or illy founded as it may be, but what would a reasonable person, a man of ordinary observation, prudence and caution, have believed to be the purposes of the deceased, and his own position—such appearances as would justify a reasonably prudent person in considering his life in imminent danger; he may act upon and will be justified, though it should thereafter appear that these indications were wholly fallacious, and that there was no actual danger. If, however, upon the other hand you shall be of the opinion that the deceased was not attempting a violent or dangerous assault upon the defendant; that in his action and conduct there was neither intention to harm, nor appearance of great peril to the defendant—if a reasonable person in the defendant's position would have had no cause to apprehend great bodily harm, and the defendant himself did not anticipate such injury, but, without being in peril, to resent the words spoken, or to repel an insignificant and trivial assault, from which neither peril to life, nor great bodily injury, could have been anticipated, he slew the deceased, such slaying is not justified, and your verdict should be one of conviction. These are general rules, applicable to all cases of this character, in which a party seeks to justify, under the plea of "necessary self-defence," an admitted homicide. That you may be the better enabled to apply these rules to the facts of the present case as you shall determine them from the evidence, I shall now call your attention to certain features of the testimony now before you, and shall endeavor to indicate to you its bearing, the purpose for which it was admitted, and the manner and extent to which it is to be applied by the jury. In so doing I shall have occasion to refer to testimony as tending to establish certain propositions of fact. Do not understand me, in so doing, as indicating any opinion as to the credibility of the witnesses, or the force or conclusiveness of the testimony, if credited. Such considerations are for you and you alone. In stating that evidence tends in a given direction, I merely indicate that it naturally points toward certain conclusions. It is for you to say to what extent, as to either direction or force, it extends. Before entering upon this branch of my instructions let me impress upon you the importance, not merely of carefully considering (as I am assured you will) the testimony before you, but of also making the proper application of the testimony thus admitted. There has been in this case very much testimony taken which was admitted for, and only tends to illustrate some single circumstance. The consideration of such testimony should be carefully restricted to the special purpose in question. The ultimate and principal fact to be determined by the jury is the character of the transaction of the 12th of February, in which Brummett was slain; as to who was the aggressor, and what was the nature of the aggression. With this transaction, the ultimate and principal fact of the case, all else that is before you is simply an illustration of and the elucidation of that central and controlling fact. The testimony of the eye-witness as to the immediate circumstances of the killing calls for no restriction as to its application, and none will be attempted. I shall now state the theories upon which the prosecution and the defence, respectively, rely; and shall then call your attention to the incidental circumstances by which it is claimed these respective positions are supported. It is in proof that these parties were the editors and publishers of rival newspapers published in the town of Hollister; that upon the morning of the homicide a vituperative article upon Brummett appeared in the paper of defendant; that after the deceased was aware of the nature of this publication the parties met near the Court House; that the deceased addressed to the defendant an indignant question; that he had at the time in the right-hand pocket of his coat a loaded pistol; that almost instantly upon the exclamation by the deceased, the defendant fired the shot by which deceased was slain; that the wound thus inflicted would have produced immediate paralysis, and that all mental volition would have instantly ceased; that the deceased fell to the ground; and that the pistol fell at least partially from his pocket. Upon the part of the defendant it is further claimed that when the deceased made the remark referred to, he at the same time advanced toward him and extended his left hand, as though to seize the defendant, and that at the same time he endeavored with his right to draw from his pocket the pistol there contained; that the remark, the threatening gesture, and the attempt to draw the pistol, were all observed by the defendant, and it was upon this he acted in firing the fatal shot. Upon the part of the prosecution evidence is introduced tending to show that the deceased did not advance upon the defendant; that he made no attempt to grasp him, and none to draw his pistol, but that the shot was fired by defendant upon the remark being made by Brummett, and upon no other or further demonstration. In your determination of these contested facts is to be found the solution of this case. For a party with threatening words and menacing gestures to attempt to draw a pistol upon another as though for the purpose of using the same, and no available means of escape appearing therefrom, is such an apparent danger as will justify the person thus menaced in slaying his assailant. This the prosecution concedes to be, as it is, unquestioned law. To the ascertainment of this, as a disputed fact, all the evidence in this case has been directed. As to the testimony of those who claimed to be eye-witnesses of the killing, there is very little that can be said by the Court. Such testimony, depending as it largely does upon the credibility of the witnesses, their opportunity and capacity for accurate observation, and correctly narrating what they observed, must be a matter exclusively for the jury. With some general observations as to witnesses, to be hereafter made, I shall now address myself to the collateral and independent circumstances, introduced in support of the respective theories of the case, and of the witnesses testifying to the immediate facts of the homicide. Evidence is before you showing that in the respective newspapers conducted by the defendant and the deceased, personal attacks by each upon the other had, shortly before the homicide, appeared. These articles, differing only in degree as to censoriousness, are before you. How this evidence is to be applied, what it tends to illustrate or establish, you will now be informed. It is a rule of law that words of reproach, however grievous, spoken or written, will not justify an assault. For attacks of this character the law has provided its own form of redress, imperfect it may appear to some; but it permits no other. With the propriety or policy of this character of journalism you have nothing to do, whether such publications by either party should have been made. That they transcend by much or by little the laws of decency does not concern this inquiry. The single purpose for which these publications are before you is a tending to show the state of mind and feeling of these parties toward each other at the time of the homicide. For although such attacks will not justify or excuse an assault, and for such purpose are not to be considered, it is equally true that they may tend to exhibit that state of mind, the feeling, and the purpose of the party making them. They may also tend to rouse the most violent resentment in the mind of the party against whom they are spoken—a resentment which may aid to elucidate the circumstances of the subsequent aggression.

It is not that your judgment upon the publications may be had that they are admitted before you; not for the impression they may produce upon you: but for the light they may throw upon the feelings and conduct of these men. It may be no easy task for you to separate in your minds these circumstances of aggravation from the act which followed and was perhaps induced by them, but to the extent to which your minds, bound by the most solemn obligations to the highest considerations of duty, can so do, this must be done. The inquiry as to these publications goes thus far and no farther. What feelings, what disposition, toward the other do such declarations exhibit? What sentiments of resentment, what motives to revenge, may such attacks incite in the person thus assailed? By the jury the publications are to be regarded without either censure or sympathy. You will judge of their effect upon others, without in any degree sharing either the feelings they may exhibit or the emotions they may excite. You neither resent the wrong nor share the indignation that undeserved injuries might naturally arouse. It is the effect upon these parties that is all-important, and this alone you are to consider. In the springs of human action, in the motives which influence the conduct of men, such aggressions may indicate a purpose, or may furnish a motive of the gravest significance. Deal with these facts as with a problem in which figures are the factors, an arithmetical conclusion the result, but in which the computator has neither place nor feeling. With these suggestions, equally applicable to other features of the evidence, I shall now call your attention to the single proposition to which the publications are to be applied: First, as to the party making them, as tending to show his hostility toward the person against whom they are addressed, and thereby tending in some degree to explain the circumstances of the homicide, it being more probable that a party who entertained and expressed a violent hostility toward another would be the aggressor in a subsequent rencontre than if no such feeling of animosity was entertained or expressed. Upon the other hand, the effect of such attack upon the party assailed, it being more probable that the subject of a vituperative attack would resent the same by violence than would a person who had received no such provocation. Evidence is before you tending to show that one Hodges, shortly before the shooting, stated to the deceased that he (Hodges) would kill a person who would make such a charge against him. This testimony is to be considered as to its possible effect upon the mind of the deceased, it being more probable that a person thus counseled would make the attack suggested than had not such declaration been made. Upon the other hand, and as part of the same conversation, evidence is given tending to show that to this declaration the deceased replied that he proposed to appeal to the law alone for redress, and not commit any act of violence. Such statement, if made by the deceased, is to be considered as tending to show that the suggestion of Hodges had no influence upon the mind or the action of the deceased. Evidence has been introduced of equivocal declarations made by both defendant and deceased concerning each other, and it is claimed that these expressions were meant as threats upon the part of those making them. It is for you to say whether a threat was expressed or intended thereby. The effect of threats, if made, is to render it more probable that the party making such threat, indicative of hostility, would endeavor to carry it into execution, and inaugurate a contest, than had not such threats been made, or hostility exhibited. It is in evidence that these parties, defendant and deceased, were both armed with pistols at the time of the rencontre, and the circumstances under which they were procured, and the manner in which they were carried, is proper to be considered by the jury. The fact and mode of carrying these weapons may indicate, as to either party, one of two propositions: First, that the party thus armed, entertaining hostility to another, would thus prepare himself for an intended violent attack upon the other; second, that either party, knowing the hostility of the other, and anticipating danger therefrom, thus armed himself to meet and resist such anticipated danger. Evidence has been introduced before you as to the general feeling in the community of San Benito with reference to this transaction. Such evidence was admitted for the single purpose of showing the probable feelings and dispositions of the witnesses taken from a community thus excited and influenced. Should this evidence be considered for any other purpose; should the fact that this feeling exists in that community have weight in your deliberations, the purposes of removing the cause for trial to this county will have been but imperfectly accomplished. Evidence has been introduced for the purpose of impeaching, by proof as to character, certain witnesses called by the defence; while upon the part of the defence witnesses have been introduced to support the character of these witnesses. It is for the jury to determine from the testimony what is the actual character of these witnesses. From the character they are shown to possess in the community, you will judge of their credibility, and the weight to be given to their testimony. The defendant has been examined as a witness upon his own behalf. This it is his right to be, and you will consider his evidence as that of any other witness examined before you. It is proper, however, for the jury to bear in mind the position of the defendant in this case, the very grave interest he must feel in your verdict, and its possible effect upon himself, and consider whether this situation and this interest may not affect his credibility or color his testimony. The burden of proof is upon the prosecution to establish beyond a reasonable doubt every fact essential to a conviction. The law presumes the defendant innocent until his guilt is clearly proven. This presumption of innocence attaches at every stage and to every part of the case, and must be overcome by the prosecution. By a reasonable doubt is meant that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction of the truth of the charge—a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

THE OTTO CASE.

SENTENCE DELIVERED IN JUNE, 1880.

George Otto, stand up. (Otto rises.) With this, the ruling of the Court upon the motion of your counsel for a new trial, but a single duty remains, that of pronouncing the judgment of the law upon the offence of which you here stand convicted. It is a painful necessity that takes from a man of your age and your position any of those years so urgently demanded—so justly due to others. It is a grave responsibility that must decide whether many or few of these fleeting years inexorable justice must exact. This is the duty I am here called to perform, and, desiring to utter not one word which shall add to the pain you must now feel, to the wretchedness of your situation, I deem it befitting this place and this occasion, due to myself and to the law, whose representative I am, that I state those considerations which have guided its judgment and measured its merited penalty. You have been convicted of the crime of embezzlement, found guilty of stealing from the public revenues intrusted to your care over twenty-one thousand dollars of the county moneys, in my judgment a most grave and heinous offence. It is not the confidence alone of trusting but misguided friends that has been abused. It is not the deposits of the few that have been misappropriated. It is the confidence of a constituency—the trusting faith of a community—that has been betrayed; it is the revenues of a county that have been stolen; it is the contribution of each and of all, exacted by the law, and given into your hands, the trusted depository of the people, as a sacred trust—it is to this high duty you have proved recreant. It is for this you now are arraigned at the bar of justice, a convicted felon. Compare your crime with that of other despoilers of men's goods, and how little does such comparison extenuate your offence. Against the robber and the thief men guard their possessions by bolts and bars—by watchfulness and the dread of retributive justice. It was you who was chosen to guard these treasures for this people. Into your hands they gave their safeguards. In the name of the law you demanded, and it was as a lawful duty that all gave to you charge of their means for the public needs. The quota of opulence and the pittance of poverty came alike unquestionably to you, its bolts and its bars, the safeguard of your honor—the faith in your integrity. And this has been your response to this trusting confidence. To the spoliation of the treasury is added the violation of a trust that should have been held dearer than life itself. Nor is this all, nor does this evil end with either this act, or your expiation of it. The treasury thus despoiled must be replenished by an increased burthen upon the community. Into every household goes again the tax-gatherer, with a more onerous, a more hateful exaction. And each harassed citizen feels and fears that he is contributing to a fund that is but to repay the cupidity and rapacity of an official plunderer. The creditors of your county are delayed in their just payments—the public credit is impaired. Your teachers are unpaid, your public schools closed, needed improvements prevented, public confidence destroyed. These are but a tithe of the fruits, many and bitter, of this your offence. For such a crime, thus characterized, thus far-reaching and disastrous in its consequences, no light infliction can be deemed an adequate punishment. The fact of former good character, earnestly urged by your counsel before the jury, I have duly considered. But how does this palliate your offence—why mitigate its punishment? To this crime there can be no other class of offenders. It is to good character and reputed integrity only that such positions of trust and responsibility are confided. It is to good character the opportunity is afforded for such a transgression. When found to be but a sham and a delusion, its shadow should not shield from merited punishment. I have reflected anxiously upon those who, guiltless of your misdeeds, now share your shame, and must suffer in your punishment. Would it were in my power to avert from these every portion of this penalty, or that in their situation I could find any just warrant for mitigating its severity to yourself. I find in my position no such privilege in the law—no warrant for such considerations. The individual who here speaks its sentence can but pity, and must commiserate these guiltless, helpless, sufferers; but before the Court there is but the offence and the offender to answer to the law he has violated. It is in no spirit of vengeance, with no feeling of resentment, that the law administers its penalties. Constrained to punish, in so doing it hopes for the offender—reformation. For others it proposes an example and a warning, and with these objects guiding the judicial discretion, its chastisements are administered. There is, in my opinion, much in this place and this offence that calls for an example, for an admonition to all intrusted with the public revenues; that it be here seen and known that if the obligations of trust, of honor, of duty, of suretyship, of social and domestic relation, be disregarded, there are dangers to be met and penalties to be suffered that may well deter even the reckless and the hardened. The sentence that the law here pronounces will, I trust, unmistakably teach that, if for kindred crimes there has been immunity in the past, their repetition in the future will be fraught with the gravest peril. In deliberating upon the penalty I am called to impose, I have considered of the past history of this county. The light of that history, baleful though it be, has been about me. By it, I trust, there may be now kindled a beacon of timely warning for the future, such an admonition to those who shall come after you, that never again in the history of Santa Cruz shall another, honored and trusted as you have been, dare to violate such trust, to follow your example, and to stand, convicted and dishonored, at the criminal bar of the county. The judgment is that you be imprisoned in the State Prison of this State for five years.

CARLETON MURDER CASE.

SENTENCE DELIVERED IN AUGUST, 1880.

This ruling of the Court leaves for me but a single duty—that of pronouncing the penalty which the law adjudges for the crime of which you stand convicted. This duty imposes upon the part of the Court many considerations and circumstances not cognizable by the jury. To the jury was submitted the single question: Were you legally justified in the slaying of S. H. Brummett? And with such care as the Court could command, the attention of the jury was directed to this single issue. To this they have answered; and their verdict determines that, without just cause or provocation, you slew the deceased. In adjudging its penalties the law has invested the Court with a much larger discretion. In the admeasurement of a penalty which may range from a limited term to one of many years, it becomes the duty of the Judge to consider all the circumstances and surroundings which have led to the offence, as well as those which accompany and characterize the immediate transaction. In the judgment of the Judge both causes and consequences are estimated, and so far as to fallible human judgment it may be given to so do, he is to ascertain the measure of blame, of moral delinquency, for which the party is to be held amenable. It is to this end that I have recalled with anxious solicitude all the circumstances of this case, as well those that preceded as those that attended this homicide, in order that there be a just apportionment of penalty to the ascertained measure of blame. What, then, are the circumstances that have laid Brummett in a bloody grave, and place you at the bar of justice, a convicted felon? It was contended earnestly and ably upon your behalf, that when you fired the fatal shot the deceased was endeavoring to draw a pistol upon you, and that your action only anticipated his deadly purpose. The verdict finds that neither real nor apparent necessity existed for your act, and that you slew the deceased without justification or excuse. Were this all—were an honest though rash mistake as to your position and peril all that could be laid to your charge, this Court would not hesitate to temper its judgment by these considerations. Nor would a mere mistake of judgment merit or receive the punishment which should be visited upon a malignant heart or wicked provocation. The history of this deplorable tragedy shows that yourself and deceased were conducting newspapers in the town of Hollister; that in your respective newspapers you assailed each the other with personalities unbecoming to good citizens or to respectable journalism; that upon the morning of the homicide you published in your paper charges against the deceased of the gravest character, accusing him of a felony, and intimating that unnamed crimes of a revolting nature could be proven againt him. It may perhaps be questioned whether this is the spirit or temper which should characterize respectable or even decent journalism. It may be doubted whether the public press, powerful as it may be for good or evil, is subserving the greatest public good by making of itself a pillory for blazoning to the world the faults, the frailties, or the infirmities of men. It may be thought that the popular taste which gloats over vile disclosures, or the journalistic spirit which panders to this depraved taste, is not to be commended; that for the press of an intelligent or enlightened civilization there may be a higher mission, alike as to purpose, temper and tone, than disseminating, with the tastes of a scavenger and the language of billingsgate, the private scandals of the community. Be this as it may, whatever may be the difference of opinion as to the propriety of these practices, one fact may be assumed: that a violent resentment will usually be provoked in the person thus assailed, and that a dangerous reprisal may be reasonably apprehended. And it may be suggested that the community which acquiesces in these onslaughts upon its citizens, that by either commendation or patronage countenances this character of journalism, has more cause for remorse than amazement when insults thus encouraged culminate in tragedies like the present. These suggestions, applicable to the present case, are not, I regret to say, peculiar to it. In the present case you published, in the most offensive manner possible, an article intended to disgrace and degrade the deceased, and certain to rouse in him the most violent indignation. Immediately following upon this cruel provocation you were in the vicinity of the deceased, yourself armed. You had every reason to suppose that your attack was then the subject of conversation between the deceased and Hodges; and you knew that the provocation you had given was fresh upon the mind of Brummett. With every probability that your appearance at such a moment would exasperate to madness this man thus assailed, armed and watchful, as one who had invited and anticipated a deadly contest, you approached Brummett, and when he turned upon you, you laid him dead at your feet.

I have considered well of your plea of "necessary self-defence." It is a rule of law, as wisely as well established, that a man shall not be suffered by his own violence to create a peril, and then under the mask of this self-invited exigency to slay his adversary. In my opinion this rule might be advantageously extended, and it may well be held that he who causelessly provokes the passions, and rouses the resentment, of another, shall be held to a different rule as to future caution and conduct than should one who has made no such aggression. To publish of another every infamy that language can express, involving, as such charges do, character, honor, and position, is of itself no trifling aggression. For such an aggressor to obtrude himself upon the person thus outraged is to more than invite—is to assure a conflict. Such an assailant should be held to full knowledge of the natural and probable consequences of his act, of the passions he has aroused. Himself in fault, caution, patience and forbearance beyond that demanded of other men may well be required of him. The aggression inaugurated in insult cannot be continued in violence and bloodshed, save upon the most palpable and urgent necessity. Nor can he expect that, casting firebrands upon every hand throughout the community, he alone shall pass unscathed through the flames thus wantonly and wickedly kindled. In this case your attack upon the deceased was deliberate and cruel. Your advance upon him, thus provoked, and smarting from your abuse, was aggravating and reckless, an invitation to whatever might follow. Upon the danger you had provoked, had anticipated, and were inviting, you acted with a deadly dispatch, a fatal swiftness that the law would not have excused in one wholly blameless. For such a crime thus caused and thus circumstanced, no trifling penalty can be regarded an adequate punishment. The judgment of the Court is that you be imprisoned in the State Prison of the State for six years. In this case I have availed myself of the experience and assistance of the Judge presiding over the other department of this Court. The views here indicated, and the judgment pronounced, express the opinion of my associate, Judge Spencer, as well as myself.

ELIZA GANNON CASE.

SENTENCE DELIVERED IN DECEMBER, 1880.

Upon the facts elicited at the trial, I can only say that it is a matter of surprise that the verdict is so lenient. The testimony established conclusively that you had entered into criminal relations with John Tully and had endeavored to force him to give you money, either by threats of violence to him or threats against his family. On the day of the assault, you proposed to kill him unless he complied with your demands. After you had fired the shots, you said he was in your power and that you intended to murder him.

To the officers who arrested you, you expressed regret that you had not killed him. If these facts do not warrant a verdict of guilty as charged, then I am at a loss to know what constitutes the crime of murder. Your statement that you did not fire the shots is simply incredible, and the jury very properly placed no credence in it. The circumstances of the case entitle you to neither sympathy nor commiseration. When a woman of your age and experience, of your life and associations, enters into criminal relations with a man of mature years, there can be but one object, and that a mercenary one. You had continually importuned Tully for money, and, failing to get it, you then made the assault. It was more than intimated during the trial that it is not your first adventure of this character. Other men have been your victims, and there have been similar attempts at violence. The Court has made inquiry, and has discovered that it is a matter of public notoriety. I have ascertained, as is my practice, that your past career has been bad, and that this is but a circumstance and incident in a life of violence, licentiousness and wickedness. The extreme penalty of the law is not more than your case amply merits; and the judgment of the Court is that you be imprisoned in the State Prison for a term of two years.

CHAPTER IX.

DUNNE vs. DUNNE.

DECISION RENDERED IN JANUARY, 1881.

I DEEM it unnecessary to state the facts of this case. Those upon which I dispose of this case are substantially agreed to or fully established.

It is claimed by plaintiff that the acceptance by James F. Dunne of the estate bequeathed him in his father's will made him at once liable to plaintiffs for the legacy charged upon the desired interest, and ~~that~~ the refusal for so long a period by defendant, in some form, to discharge this bequest to plaintiff has deprived him of the privilege of electing to satisfy in land or in money as he shall deem best.

Upon the part of the defendant it is insisted: First, that this Court has no jurisdiction of this inquiry, but that as the estate is as yet undistributed, and still in course of administration, plaintiff's remedy must be pursued by motion in the Probate Court. Second, that this action is premature, and that the defendant cannot be required to pay this legacy until the final distribution of the estate; and lastly, that if neither of these petitions be deemed well taken, that the defendant is not deprived of his right to elect in which manner he will satisfy this legacy, but may now exercise that election.

These I understand to be the principal positions contended for by the respective parties to this controversy.

I am of the opinion that this Court has jurisdiction of this matter. It does not follow that because a party has an interest in an estate, that it must necessarily be enforced in the administration of the estate. This is not, as I understand it, a claim against the estate, nor one cognizable in due course of administration, nor do I understand that these plaintiffs could be heard in the Probate Court to assert the claim they are now and here contending for. Originally intended as a legacy, and possibly enforceable by order of the Probate Court, it has in consequence of the situation of the property, and the course pursued by the executor and devisee, become a trust, carrying with it special equities, existing in the defendant as the administrator of the estate and of its settlement, and neither cognizable in nor enforceable by the Probate Court.

When such a state of affairs is presented, when trusts have arisen or rights have accrued that cannot be fully and wholly disposed of in the probate proceeding, I understand it to be well settled that a Court of Equity will take jurisdiction and fully enforce that which in the Probate Court could have been but partially and imperfectly adjudicated.

Entertaining jurisdiction of the matters set forth by plaintiffs in their bill, it is claimed by the defendant that he has not elected to accept this estate, and that until such election he cannot be charged with the payment of these legacies. There is no dispute as to the law, and that it is as contended for by the defendant. There can be none as to the fact that the defendant has accepted the legacy, and with it these charges. I pass the mortgage given by defendant to Mrs. Catherine Dunne. Under the circumstances, that may perhaps not be considered as an unequivocal act of acceptance, but his acceptance of the rents of this property to the amount of $22,000 is not qualified by any such circumstances. He admits that he received these as rents, and as owner of the devises of the will, and that they were paid to him by the executors as such, or credited to him in that relation. To be sure, the defendant had possession at the death of the testator as a tenant, and his lease had not expired. This fact would answer the mere fact of possession, were that all. Such possession would be equally consistent with either his position as lessee or as devisee, and could not, standing alone, be applied to the latter more than the former relation.

The retention and reception of this large amount of rents, that as against any one but the heir or devisee must have gone to the estate, cannot be explained upon any other theory than that of an acceptance of the estate. If he held as lessee, it was his duty to pay over these rents. If he held as devisee, it was his right to retain them. His action and intention will be attributed to the position that conformed to right and duty rather than to that which violated both, and I have no difficulty in finding upon the part of the defendant an acceptance of the bequest of the will, and of its corresponding obligations.

Has the defendant the privilege of now electing to give to these legatees land or money, as he may prefer? Under the common law, as well as by the provisions of our code, legacies are to bear interest from one year after the death of the testator. Had these legacies been for money only, there could be no question that they must bear interest from that date. Can the defendant, by his own unconscionable delay, now deprive these plaintiffs of the value of the use of that which should have come to them in June, 1875? If he can now elect, and elect to pay them money, can he satisfy the legacy by paying the $10,000 without interest, or can he give them land, and if he does, can he be required to supply more than the $10,000 in value as provided in the will of James Dunne? If he can now pay these plaintiffs either the original $10,000 without interest, or that amount in land, it follows that these legatees have for nearly six years had withheld from them property and its use that was rightfully theirs, and that defendant, having during all this time had the benefit of this property, cannot be required to make any compensation for its withholding or its use.

In my opinion, the defendant was entitled to a reasonable time to consider in which mode he would satisfy these legacies; that having by his failure to do so placed these parties in such a position that just compensation cannot otherwise be made, a Court of Equity will treat this failure and neglect as a breach of duty, and so adjudge that the wrong-doer shall not profit by his misconduct, or the party wronged suffer further from this neglect. This can only be done by treating this failure to select on the part of the defendant as a relinquishment upon his part of this right, and as transferring this abandoned privilege to the plaintiffs.

It will be so considered, and the judgment will be that these legacies are to be paid in gold, together with legal interest from the 8th day of June, 1875. Counsel for plaintiffs will prepare and submit finding, and a decree in accordance with this opinion.

GOODRICH vs. HAYES.

DECISION RENDERED APRIL, 1880.

This action has been contested with a vigor and earnestness more commensurate with the feelings of the respective parties than with the amount involved. This fact, and the nature of the controversy, induce me to present some of the principal considerations which have led to the conclusions attained. The plaintiff and his son testify to the employment of the plaintiff to furnish plans and supervise the construction of a theatre. The defendants, with much positiveness, deny this, and assert that the plaintiff was only employed "about the lowering of the flooring in the former hall."

I shall assume that the relation and position of the younger Goodrich gives him the same bias as to the feeling that may be supposed to arise from direct pecuniary interests; and that so far as numbers and feelings are involved, that these parties are on an equal footing. I shall now consider what circumstances have been shown that tend to support either side of this controversy. It is admitted that defendants proposed a material change in their building, and that they contemplated the construction of a hall which might also be adapted to theatrical and dancing purposes; that the plaintiff is an architect of prominence in this community; that the defendants consulted him as to the proposed changes, and that he made measurements, and suggested plans and methods for carrying out the purposes contemplated by defendants; that the suggestions and plans were not restricted to the lowering of the floor; that the plaintiff accompanied the defendants to San Francisco, and with them examined two public buildings, for the purpose of ascertaining whether any features of these buildings could be made available for their proposed edifice; that the features of these buildings so inspected were as to matters concerning the arrangements of galleries and seats, and wholly independent of the position or fact of lowering the floors; that the defendants, with plaintiff, visited and inspected two churches in San Jose for the same purpose, to wit, of examining them as to the arrangement of galleries and position of the seats. It is proven that the mere lowering of the floors did not require the services of an architect, but the same could be and was successfully accomplished by ordinary mechanics, with little or no attention from the architect; that the defendants on several occasions stated that they were constructing a theatre, and that plaintiff was their architect about the work.

It is admitted that the plaintiff was discharged on the 20th of December, 1878, and that on the following day Mr. Reemer, an architect from San Francisco, was engaged by defendants to proceed and construct a theatre upon these premises, and that he did take charge of the work at the point where plaintiff was dismissed, and at once prepared plans and supervised to completion a theatre in this place. It is proven that the dismissal of plaintiff was in consequence of a personal disagreement between himself and Mr. Hayes as to the position of the stage, and that plaintiff had not at that time completed the work which defendants admit he was employed to supervise. It is proven that about the time the plaintiff was dismissed he stated to one or more persons that he "had no plans prepared for a theatre, and that he had nothing to do with the employment of the men on the work." It is admitted that the tender made to plaintiff by defendants of $51 upon the day on which he was dismissed was in anticipation of legal difficulty from this discharge. The following are the salient points in this case:

One of these circumstances has been much relied upon as supporting the defence.

The statement of Goodrich that "he had no plans." In my opinion this, as a fact, has little weight in this case. The question is not, did plaintiff furnish the plans and give the attention required?—but, was he employed to supervise the entire work, and was he discharged without good cause? The defendants do not pretend any failure on his part to do, as was required, all that belonged to his contract, but they insisted that he had done all that he was engaged to do. It might well be that plaintiff had prepared no specifications or drawings at the time mentioned; and it is also possible that all these would have been furnished as required. Specifications, plans, and detailed drawings are usually produced as the work advances; and it is enough that these are produced as needed—at all events unless some objection was made upon this ground.

The other circumstances above detailed make decidedly for plaintiff's version of the matter.

Each and everyone of them is consistent with the idea that plaintiff's engagement embraced the theatre and was not confined to the lowering of the floor. It is quite possible that the defendants did not propose employing Goodrich to do more than lowering the floors, and that the circumstances detailed were accidental, or brought about by the procurement of plaintiff.

This will not relieve the Court from giving these circumstances their full weight. If a party permit himself to be used as a factor in a line of circumstances, it will not do to permit his statement to contravene the legitimate and natural conclusions deducible from such conceded facts.

To do so would deprive Courts of the very important aid always derived from attendant circumstances. In my opinion the course taken by the defendants was such that plaintiff might well have understood that he was employed for all the work then intended by the defendants.

Leaving out of view the positive testimony of Goodrich and his son upon the one hand, and of the two defendants on the other, and requiring the Court to determine the extent of the contract from the independent circumstances shown, I think that but one conclusion can be drawn: that the plaintiff at least had good reason to suppose his engagement was for the completion of the building. If there be any doubt, any uncertainty, it is occasioned by the course pursued by the defendants—by their dealing with and treating the plaintiff as though this was his employment. In such a case, says our code: "In cases of uncertainty not removed by the preceding rule, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party."—Sec. 1654, Civil Code.

This section, though specially applicable to written contracts, furnishes a summary of much that has been written—not merely upon the construction of contracts, but of rules for their first ascertainment. If I am correct as to the contract entered into between these parties, the legal rule applicable is simple and plain. The plaintiff was dismissed from his employment before its completion, and without sufficient cause. He is entitled to recover the price agreed upon as damages resulting to him for the breach.

Judgment for plaintiff for $299 and costs of suit.

LITTAUER vs. FEIST, LEVY, FRANK & CO.

DECISION RENDERED APRIL, 1881.

Nathan Littauer vs. Jacob Levy, Adolph Feist, A. L. Frank, Felix Feist, Benjamin Hagan and Isaac Manheim and Geo. L. Richardson, *et al.*, intervening with plaintiff, in equity.

Plaintiff's bill shows that Adolph Feist, A. L. Frank and Jacob Levy composed the firm of Feist, Frank & Co. for several years prior to 1879, doing business as dry goods merchants in San Francisco; that plaintiff is a judgment creditor of said firm for a large amount; that said firm and its members are insolvent; that the judgment of plaintiff has become and is a lien upon the real property of any of said defendants in the county of Santa Clara; that about the 19th of September, 1879, attachment suits were commenced against Feist, Frank & Co. by Hagan & Manheim for about $14,000; that about the same time a similar suit was brought against Feist, Frank & Co. by Felix Feist for $25,000; that both these actions were brought upon promissory notes alleged to have been given by Feist, Frank & Co. to said parties; that the defendants suffered default in said action; that executions issued and were levied upon the property of said firm; that under these executions certain goods of Feist, Frank & Co. and also certain town lots in the city of San Jose were sold; that Felix Feist became the purchaser of said town lots; that out of the sale of the personal property and the realty above set forth the amounts of the Hagan & Manheim judgment and the Felix Feist judgment were paid and satisfied.

Plaintiff avers that the notes sued upon by Hagan & Manheim and also Felix Feist were false and fraudulent, antedated and without any consideration whatever, and made to hinder, delay and defraud the creditors of Feist, Frank & Co. George L. Richardson, with many others, intervenes. These interveners show that they are judgment creditors of Feist, Frank & Co., having unsatisfied claims of large amounts; that their judgments have become liens upon the real estate of any of the members of this firm in the county of Santa Clara. They repeat substantially the averments of the "Littauer" bill as to the fraudulent character of the Hagan & Manheim and Felix Feist judgments; and they pray that they be permitted to share with plaintiff the expenses and the fruits of this litigation. To the bills of plaintiff and of these interveners the several defendants file separate answers. The insolvency of the firm of Feist, Frank & Co. is not admitted. All charges of fraud, want of consideration and antedating of notes are denied, and generally all averments that call in question the honesty and fair dealing of the defendants and the justice of their claims. By a supplemental bill, the plaintiff and interveners further set forth a pretended sale of Jacob Levy to Felix Feist of a certain lot of land upon Second street in San Jose. This they claim to have been fraudulently made without consideration, and to hinder and defraud the creditors of Feist, Frank & Co. To this Felix Feist and Jacob Levy make answer and deny fully all fraud or fraudulent practices or purposes charged against them. The transactions in question involve in some respects distinct and independent matters and different parties. They will be separately considered. Hagan and Manheim were real estate agents and note dealers in the city of San Francisco. Their general business one of agency; their specialty, purchasing with the money of their principals the negotiable paper that was offered in the markets of San Francisco. In the year 1878 they purchased or received from Feist, Frank & Co. the note of this firm for $4,000, and in the early part of the year 1879 two other notes for $5,000 each, from the same firm. These notes were drawn by the firm and made payable to its own order. They were indorsed in blank by the firm, upon the back, and delivered to the purchaser. Hagan & Manheim, receiving these notes, delivered them without further indorsement to the parties whose money had been paid for them. Under their general business Hagan & Manheim usually collected from the makers of notes negotiated by them the accruing interest, receipted for it to the maker, and saw that it was credited upon the notes in the hands of the holders. From the date of the first note so received by Hagan & Manheim there had been several renewals of these notes. These renewals were generally made by an indorsement to that effect; but in one or more instances by taking up the original note and giving a new one which was negotiated by Hagan & Manheim with a new party. In the month of July, 1879, Hagan & Manheim became doubtful as to the financial standing of Feist, Frank & Co., and consulted with the law firm of Sharp & Sharp as to the best mode of securing the amounts of these three notes. They were advised to take notes payable upon demand, instead of the former notes, as they would thereby be enabled to take prompt action should it become necessary so to do. Acting upon this advice, Hagan & Manheim procured from Feist, Frank & Co., in the latter part of July, 1879, three demand notes representing the three notes before that time negotiated by these parties. At the time these demand notes were given the former notes were owned and held, the one for $4,000 by Julius Newman, one for $5,000 by Walker & Co., one for $5,000 by W. Sahlm. These notes were at the time in the possession of these parties, and not in the possession of Hagan & Manheim. The owners of these notes were not aware of these new notes given to Hagan & Manheim, nor were these notes given to them, nor did they at that time, or for a long time thereafter, deliver up or cancel their original notes, so held by them. Hagan & Manheim at no time had any other interest in these notes or in the money loaned than the commissions received by them as brokers for making the purchases or collecting the interest. About the 19th of September, 1879, a number of attachment suits for large amounts were commenced in San Francisco, against Feist, Frank & Co. Their stock of goods was seized and their store closed. The aggregate amount of these actions was over $180,000. Among these the notes given Hagan & Manheim in July, 1879, were sued on, and also five notes aggregating $25,000 were sued upon by Felix Feist. Many of these suits were brought by the firm of George F. and W. H. Sharp. The defendants did not answer and judgment by default was duly entered. The stock of goods in San Francisco was sold under executions issued upon these judgments. At the Sheriff's sale a portion of the goods were bid in by attaching creditors, but much the greater portion were purchased by Martin Herman.

The whole amount realized from the sale was $182,939.55. After deducting expenses there was applied upon these executions $179,657.75. The attachment of Hagan & Manheim was last in time, and there was applied upon their judgment only $3,908.59. The firm of Feist, Frank & Co. are insolvent, and after the application of all the proceeds from the sale of their goods there remained unpaid over $150,000. After the sale M. Herman sold the goods by him purchased to his brother, A. Herman, and the latter proceeded at once to sell off the stock so purchased. The goods after the Sheriff's sale remained in the store in which they had been kept by Feist, Frank & Co., and so remained until sold out by Herman. A. Herman employed as salesmen, in disposing of these goods, A. L. Frank and Jacob Levy. In making the purchase at the Sheriff's sale about $130,000 had to be paid by Herman. This was paid by a check for that amount given by William Scholle upon the Bank of California. The money upon this check was drawn by the Sheriff and applied upon the executions in his hands. As the money was realized by Herman from the sale of these goods it was deposited with Wm. Scholle. From the money so deposited certain of the claims sued upon were paid, among them that of Felix Feist, as will be hereafter more particularly stated. Upon the 9th of October, 1879, Hagan & Manheim caused an execution to issue upon their unsatisfied judgment, and the same was by the Sheriff of Santa Clara county levied upon the undivided interest of Jacob Levy in a number of lots of land in the city of San Jose. These lots were duly advertised and sold. At the sale these lots were sold in one parcel, by direction of Jacob Levy, the judgment debtor. They were bid in by Felix Feist for $8,000. The amount of this bid was paid by Felix Feist from the money received from the sale of the goods of Feist, Frank & Co. upon his judgment for $25,000 against this firm. Upon the foregoing facts it is insisted by plaintiff that the Hagan & Manheim judgment and all proceedings had under it was void, for the reasons: First, that there was no debt due Hagan & Manheim, who recovered the judgment, but that the demands they undertook to sue for were claims due respectively to Newman, Walker & Co. and Sahlm. Second, that after the Sheriff's sale there was no change in the possession of the goods, but that they remained in the same place, and that two of the former owners were employed by the purchaser, Herman, as salesmen. Third, that the lots in San Jose were sold in bulk and not in separate parcels. Other circumstances are incidentally argued, but the foregoing states the principal points urged. Is Hagan's statement the real history of this transaction? Hagan, Manheim, Feist, Frank and J. Levy all testify to it. The several holders of the notes, Newman, Walker and Sahlm, each testify to his individual transaction. The checks by which they were paid, before any question as to the genuineness of their claims was made, are all produced and vouched for by the bank on which they were drawn. Hagan produces the checks for the money furnished by him when the original loans were made, all confirmed by bank indorsements, and he refers in his testimony to entries made at the time in his books, which he states "*are in his possession*, to be produced if desired." That neither party offered these books in evidence may be deemed a concession that Hagan's statement would not have been shaken by the entries in his books. From all these circumstances I am satisfied these were genuine claims, and that the demand notes were taken for the sole purpose of securing to Newman, Walker and Sahlm a more convenient mode of collecting their debts. It merely secured for antecedent debts, notes long overdue and several times renewed, certain advantages in the way of collection. Feist, Frank & Co. had the right to give this preference. Hagan & Manheim assumed to act for the holders of these original claims. Newman, Walker and Sahlm ratified this action and accepted payment of the demand notes as full satisfaction of those in their possession and surrendered the latter. Upon the facts here shown, Newman, Walker and Sahlm could have compelled Hagan & Manheim to pay over to them the amounts collected as money received for their use. That can hardly be deemed a fraud from which such a legal obligation follows. Leaving goods in the store of the former owners, and employing two of the members of that firm as salesmen, would be at most but a circumstance; against it the fact that these goods were sold at public auction by the Sheriff and under executions which are not questioned, for nearly $150,000. This circumstance can have no force, is fully explained. If this objection is taken under the Statute of Frauds, it may be answered: first, a sheriff's sale is not within the Statute, and second, that the parties objecting are neither attaching creditors nor subsequent purchasers in good faith. These claims all accrued long before these attachments, and they are wholly without the Statute. The sale in bulk of several parcels of land in San Jose, so made by direction of the judgment debtor, Jacob Levy, was not a fraud on the part of Hagan & Manheim, under whose execution this sale was made. If the defendant or any other party in the suit was injured by this course, the remedy was by motion in the court in which the judgment was rendered to have the sale set aside. If the party was not in a situation so to move he could have filed a bill, setting forth that by this mode the property had been sacrificed to his detriment, and upon such showing equity would probably relieve. No such showing is made by this bill. As to the proofs, all that was offered shows that this was the most advantageous way in which these lots could have been sold. Upon none of these grounds urged do I see any sufficient cause for disturbing the Hagan & Manheim judgment, or the sales made thereunder. I now consider the case of Felix Feist. As already stated, Felix Feist was one of the attaching creditors who recovered judgment against Feist, Frank & Co. His judgment was upon five promissory notes for $5,000 each, alleged to have been given for moneys advanced to this firm by F. Feist. The validity of these notes is denied by plaintiff, he claiming that the so-called notes were false and fraudulent, without consideration, and given to defraud the creditors of Feist, Frank & Co. All the notes sued upon were withdrawn by Feist, Frank & Co. after the judgment and destroyed. Felix Feist testifies as follows: That he was a member of the firm of Feist Bros., consisting of himself and his brother, Joseph Feist, in the dry goods business in San Jose; that in the year 1876 he began withdrawing from this business portions of his capital invested therein. That this withdrawal was effected by Feist Bros. remitting to Feist, Frank & Co., at San Francisco, money with directions that certain payments were to be made upon account of Feist Bros., the balance, if any, to be placed by Feist, Frank & Co. to the individual account of Felix Feist: that such balances remained with Feist, Frank & Co. upon open account (or tag, as the witnesses term it) until they amounted to $5,000, when the firm note of Feist, Frank & Co. for this amount was forwarded to Felix Feist. That in this manner the three notes dated prior to July, 1878, were given; that in the month of July, 1878, Felix Feist sold his half-interest in the business of Feist Bros. to Meyer Levy, for $9,900, Levy giving two promissory notes, payable at different future times, for the purchase price; that when these notes became due, Levy, by the direction of Felix Feist, paid the same to Feist, Frank & Co., and they gave to Felix Feist their two notes for $5,000 each, for the money so received. It is upon these five notes the $25,000 judgment was recovered by Felix Feist against Feist, Frank & Co. I shall first examine the evidence as to the first three of these notes in question. The testimony of Felix Feist is repeated by his brother, Joseph Feist, and by the three members of the firm of Feist, Frank & Co. What is there to controvert the positive testimony of these parties? What evidence besides the statements of witnesses should in the ordinary course of business have here existed? The first $15,000 was withdrawn by Felix Feist from his share of the capital in the business of Feist Bros. His half in this business was sold in July, 1878, for $9,900, and the sum of $15,000 is no inconsiderable item for one partner to withdraw from a capital of $20,000. A record of these withdrawals should have appeared in the books of this firm; no less as an important financial fact, than for the security of the members of the firm out of which this considerable sum was taken? It is impossible to suppose the books of a firm in which such a transaction occurs should not exhibit this fact. These books were important for another consideration, they would have shown the general financial condition of this firm and thrown some light upon the probability of such a sum being withdrawn without embarrassment to the business. Meyer Levy testifies that after he purchased the interest of Felix Feist, with his knowledge and consent and with that of Joseph Feist, he destroyed these books. Why these books should have been destroyed at all is not made very clear, and many cogent reasons may be suggested why Mr. Levy should not have permitted their destruction. He had purchased at a considerable price the interest of Felix Feist in this company. He had a right to assume that the books by which he bought should truthfully show its assets and liabilities. Had it thereafter appeared that the affairs of this firm were materially worse than as disclosed by these books; had claims against the former firm not there shown been thereafter established; had debts appearing due to the firm been found non-existent, Levy would have had a right of action against F. Feist, and these books would have been of the utmost importance to him. Again, while Felix Feist might have been satisfied as to the worthlessness of the unpaid accounts shown by these books, would the purchaser, the party who had not dealt with these parties, have had the same means of knowledge, or been willing to release these claims without an effort for their collection? It may be further stated that the testimony as to the manner, purpose and time of destroying these books is by no means satisfactory. It appears that one or more bills, apparently taken from these books, have been made out at a recent period. If these books were destroyed after this suit was begun, or after it was threatened, this unfortunate destruction loses none of its significance from that fact. The firm of Feist Bros. kept their bank account with the San Jose Savings Bank. This account was given in evidence by the plaintiff, and shows the dealings of Feist Bros. with the bank from 1876 to 1878. The general current account shows debits and credits in about equal amounts, with occasional slight overdrafts. This account discloses no considerable accumulation of money. Upon the same pages of the account appears an interest account upon notes of Feist Bros. held by the bank. These interest charges range from $40 per month to $70 and $80. They extend continuously through the whole period of this account, and at the then current rate of interest, one per cent. a month, would represent an indebtedness upon the part of Feist Bros. by note of from $4,000 to $8,000. That a business man should pay one per cent. per month interest upon so large an amount, while placing his money "upon tag," where, I understand, interest is not paid, and unsecured with a mercantile house, is not in accordance with the practices of individuals influenced by the usual considerations of self. I regard this fact as one of no slight significance. Passing what does and does not appear in the San Jose part of the transaction, these matters should have appeared frequently and conspicuously in the books of Feist, Frank & Co. This firm is represented as doing a business of half a million of dollars yearly, and employed a skilled book-keeper. If these books were kept in any approved or instructive method, they should have shown the amounts and dates of the several remittances placed to the credit of Felix Feist. With these the firm should have been charged. When these remittances aggregated the amount of $5,000, for which a note was to be given, the account should have credited the firm with the note so given. Upon these notes $3,000 to $4,000 interest must have accrued. If paid as it accrued, Feist & Co. should have been credited by such payments. If the accruing interest went into the succeeding note, the same entries, credit and debit, should have been made. In no simpler form could the books of this firm have preserved a proper record of these transactions. Had these books been produced, had they shown these entries in their orderly sequence, in the general account of this company, the entries of a solvent party against its own interest, and continuing through a series of years, they would have afforded the most convincing proof of the transaction. Upon the other hand, had the books when produced exhibited no such entries, that fact would have been most difficult of explanation. These books were not produced. The counsel for plaintiff made every effort to obtain them, but failed. The three members of the firm of Feist, Frank & Co. were severally questioned under oath as to these books, and each and all answered that they did not know where they were. I have indicated the importance of these books as evidence. I shall now consider who is responsible for their non-production. The Sheriff's return shows that the accounts of Feist, Frank & Co. were levied upon by him under attachments.

Wm. Scholle testified that he purchased some of these accounts. The great bulk of the goods and probably of the accounts were purchased by A. Herman. Be that as it may, after the Sheriff's sale the books remained in the safe and store with the other purchases of Herman. Frank testifies that the last time he saw these books he took them from the safe at the store for Woods, the agent of the New York creditors; that after he had examined them, he (Frank) replaced them in the safe and has not seen them since. It may be here stated that the relations between these parties are of a very intimate character. Wm. Scholle has been for years the correspondent of Feist Bros. All the arrangements made by Feist in this transaction were through Scholle. Herman, who purchased these goods, is the friend and business associate of Scholle, and the latter holds a general power of attorney from him. Frank is the nephew of Scholle. Jacob Levy is the brother-in-law of Felix Feist. Frank and Jacob Levy continued in the store in which these books were deposited until the stock was sold. That thus connected and thus circumstanced these defendants could have produced these books, I make no question. That they did not is to my mind a circumstance of weight.

As to the last two notes for which the payments were made by Meyer Levy the negative circumstances are even more significant. According to the testimony of Felix Feist, Meyer Levy and the three members of the firm of Feist, Frank & Co., this money was received and the two notes for $5,000 each given after the month of July, 1878. According to Feist and Levy it was the purchase money of Feist's interest in the store, paid by Levy, under Feist's direction, to Feist, Frank & Co. It would seem prudent that for so considerable a transaction as the payment of $10,000 upon account of another Meyer Levy should have kept some memorandum, some form of voucher. If such were taken it is not produced. There are records, however, that must have been made and must be in existence. Meyer Levy testifies that he sent this money by checks of the Gold Note Bank of San Jose. Felix Feist testifies that it was sent by checks. As this was the payment upon the two notes falling due at different times, two checks must have been given. Of this transfer the following record should have been made: Meyer Levy must have drawn his checks upon the San Jose bank for the amounts required. These checks, according to all banking usage, would be returned to him in his settlement with the bank, and the item would also appear upon his pass-book. Suppose, however, these checks and this pass-book to have been destroyed, the books of the bank would have shown the drawing of the checks by Levy. The checks drawn by the San Jose bank upon their San Francisco correspondence in favor of Feist, Frank & Co. would in the regular course of business be returned, bearing the indorsement of this firm, to the San Jose bank, and would now be with their records; while the accounts of the San Francisco bank would show the payments to Feist, Frank & Co., or to their order, of these two sums of $5,000. These remittances would also have appeared upon the books of Feist, Frank & Co., but the non-production of these books has already been considered. The importance of establishing these two payments is obvious. Not only is the amount in itself considerable—$10,000—but it would have shown that Felix Feist was dealing in this way with the San Francisco house, and have greatly strengthened the probabilities that the other advances were made as asserted. None of these memoranda were offered, and what reason can be suggested why they were not produced? As to the Gold Note Bank, its records were within a stone's throw of the place of trial. Ignorance does not explain this omission, for these parties are all business men, perfectly familiar with the routine and records of banks. Nor would the very capable counsel of the defendants have either overlooked or omitted so important a fact. It was not that they were not apprised of the importance of such evidence. In the Hagan & Manheim branch of the case, tried at the same time and in the presence of these parties, Hagan produced the check and vouchers by which all his payments were shown. The plaintiff, in his bill, and at the trial, asserted in unmistakable terms that no consideration whatever was given for these notes. With these, the charges urged against him, with the significant avowal that the account books of the two houses in which these transactions should have appeared were destroyed or lost, the defendant should have been vigilant in searching for, and swift to produce, whatever would corroborate his statement and attest his honesty. He offered nothing of all this, which, if it existed, was at his very hand. This, then, is the case: This positive testimony on the one hand, these cogent circumstances on the other. The axioms of the books furnish the rules for estimating these considerations: "Fraud and falsehood are twin sisters. Where one is found the other generally follows. When, therefore, the circumstances of a case are highly equivocal, and point strongly toward the existence of fraud, such circumstances are not to be outweighed by the most positive and emphatic statements of the implicated parties. The observation of mankind universally shows that those who embark in fraud rarely hesitate at falsehood, and strong circumstances of suspicion are not to be overborne by such testimony. It is not necessary to establish fraud by direct and positive proof, for this can seldom be done. Generally the first effort of a man who intends to commit a fraud is to throw a veil over the transaction, to shield it against assault, and to baffle all attempts at detection. * * * Fraud is committed in secret, and usually hedged in and surrounded by all the guards which can be invoked to prevent discovery and exposure, and is usually established by circumstantial evidence." (Bump on Fraudulent Conveyances, 581.)

"The facility with which a fictitious payment may be fabricated renders it necessary for the party to produce all the proof which may reasonably be supposed to be in his power of the reality and fairness of the transaction, and the want of clear proof is evidence of fraud. Such proof is vital to uphold a transfer in other respects surrounded with suspicion, and this requirement is not met by the mere production of notes and receipts, or the mere proof of payment without any attempt to show where the money came from, how it was obtained, or whose it was, or what was done with it." (Ibid, 54.)

"So when the relation is such as to give rise to confidence, such as consanguinity, confidential friendships, or the like, the parties are held to fuller and stricter proof of the consideration and of the fairness of the transaction." (Ibid, 37.)

These are but the synopsis of a multitude of decisions in which the rules above stated are reiterated, and to multiply authorities upon these points would hardly strengthen such self-evident propositions. These rules require no argument for their application to the case in hand. The circumstances of the transaction were in the highest degree equivocal and suspicious.

The evidence that it was in the power of the defendant to produce, and which would have answered these objections, he has neither offered nor attempted to procure. The cases above quoted say that such an omission in such a case is "vital, and evidence of fraud." I am of the opinion that the five notes upon which Felix Feist recovered judgment for $25,000 against Feist, Frank & Co. were without any valuable consideration, fraudulent and void. This determination necessarily disposes of another branch of this case, to wit—the sale by Jacob Levy to Felix Feist of the house on Second street. It is admitted by all that any money paid by Feist on this purchase was the money he had in the hands of Scholle from the $25,000 judgment, recovered against Feist, Frank & Co. This being the case, the right of the creditors of Feist, Frank & Co. to follow this fund as far as it can be clearly traced is well established. The same rule applies to the Sheriff's sale made under the Hagan & Manheim judgment. Felix Feist was the purchaser at that sale, and the purchase price was from the same money in the hands of Scholle. While, however, this conclusion may dispose of the principal question, I shall briefly consider the testimony as to this alleged sale. Felix Feist and Jacob Levy testify to this: That the latter proposed to sell this property to Feist for $7,500; that this sum was paid by Feist to Levy in the bed-room of the former in San Jose; that Felix Feist went to San Francisco and obtained the money from Wm. Scholle, and brought it to San Jose; that it was paid to Jacob Levy here for the reason that he had creditors in San Francisco who might trouble him. Jacob Levy testifies that immediately after the payment he returned to San Francisco, and that he paid out the money in various ways. The bills which he produces account for less than one-third of this amount, unless three notes for $1,000 each be taken as disbursements; these Jacob Levy testifies he loaned to one Herndon, a cousin of his wife, and now insolvent. The deposition of Jacob Levy was taken by plaintiff some months before this trial, and he was pressed with great pertinacity by counsel as to the disposition made of the money received from Feist on this purchase. He answered, giving the names of several parties to whom he had paid bills, but made no mention of the loan to Herndon, and said he could not recollect the persons to whom he had paid money. He now produces the three notes given him by Herndon, and explains his former omission by saying that he had forgotten this loan. If this be so, and if Jacob Levy had really forgotten a loan of $3,000, which must have represented more than half of all he possessed, his recollection may well be distrusted as to other matters. Upon the day of the Sheriff's sale, at which Felix Feist was the purchaser, the latter executed a will, or codicil to a former will, by which he left all of his real estate to his sister, the wife of Jacob Levy. This will was so executed after a conference held upon that day between Felix Feist and Jacob Levy. No testimony was offered as to the subject of the conference between these parties. That a brother should provide by will for a necessitous sister is an exhibition of fraternal solicitude and forethought most commendable; but while such acts are generally the promptings of affection, we do know that the same course is often resorted to by a fraudulent grantee to secure his fraudulent granter against their purpose being frustrated by the interposition of death. No reason is suggested why this special codicil should have been added at that particular time. That an equivocal transaction transferred to Felix Feist all the real estate of Jacob Levy gives to this will, made the same day in favor of Jacob Levy's wife for the same property, whatever of significance this act possesses. It may be added that if I am correct as to the character and purpose of the original transaction, if the notes for $25,000 were without any consideration, and intended to defraud creditors, it is not a very violent assumption which attributes to the later transaction between the same parties in which the money fraudulently obtained on the $25,000 judgment supplied the asserted consideration the same fraudulent purpose which had characterized the original transaction. In my opinion, if the money was paid to Jacob Levy when the deed was made by him to Felix Feist, it was part of the funds obtained by Felix Feist through the fraudulent judgment against Feist, Frank & Co., and was so paid and the deed so taken for the purpose of further hindering, misleading and defrauding the creditors of Feist, Frank & Co. It is not necessary that I should pursue this inquiry further. The questions involved I have examined with much solicitude, and can attain no other result. Judicial duty compels the decision announced. Justice to myself as well as to the litigants that I should retrace the steps which have led me to this by no means agreeable conclusion.

Counsel for plaintiff will prepare and submit findings and decree.

GIFFORD'S PLEA.

DECISION RENDERED APRIL, 1881.

The only question here is whether the party held to answer by the committing magistrate has had an examination as contemplated by statute and the Constitution. As I understand the record, the examination continued for three or four days. It would seem that there had been some investigation in that time. It is claimed that, in addition to the other objections, the defendant was deprived of his right to examine and cross-examine certain witnesses. Into the manner in which he was restricted of his rights, I may say, in relation to the committing magistrate, the manner in which he conducts the examination is largely in his own discretion. Should he grossly abuse that discretion, a higher court might interfere in the interest of justice. It is claimed that a substantial right has been wholly denied the defendant. The facts disclosed do not warrant that assertion. A postponement or an adjournment is a matter of grace. In this case it is claimed that the defendant had a right to place the prosecuting witness on the stand for further cross-examination. Had the defendant been on trial for his life it would have been a matter of discretion with the Court to decide whether or not the prosecuting witness should be recalled for further cross-examination. The Court, however, permitted it, and the defendant should have taken the means to produce her; he should have called her at the door, or taken some steps to avail himself of the privilege granted him. It is claimed also that he was not permitted to present the testimony of a lady who was sick at the time, and the Court very properly stated that the counsel might produce her testimony during the intermission.

The counsel claims that he has an absolute right to proceed and hear the testimony. The Court will usually make such temporary postponements, but we do not understand that the defendant has any right to dictate to the Court the manner in which proceedings should be conducted. It is claimed that the defendant was deprived of an important right in not being permitted to present authorities. It is not unusual for courts in cases of the most complicated testimony to limit the counsel to a stated time for the argument of such matters. It is not uncommon for attorneys of the highest standing to be refused to argue propositions of law which Judges regard as axioms. If Judge Veuve was of the opinion that the testimony in the case was sufficient, he might so inform the attorney for the defendant in order to save him from useless and unnecessary labor. I do not care about reviewing the case here, but I have read it and gleaned it from other sources, and do not think there is any material difference from that of the actual proceedings. Therefore I shall deny the motion, and remand the defendant to the charge of the Sheriff.

GIFFORD'S BAIL.

DECISION RENDERED APRIL, 1881.

The defendant is held to answer under an information filed in this Court, charging him with a rape. In holding the defendant to answer upon the preliminary examination, the committing magistrate fixed the bond at $10,000. It is claimed by counsel for the defendant that this amount is excessive and is in substance a denial of bail. That this is a bailable offence is not questioned. Is it excessive? The Constitution of the United States, of this State, and, it is believed, of every State in the Union, declares in terms that "excessive bail shall not be required," and in indicating the capital offences in which bail may be given, "excludes only those in which the proof is evident or the presumption great." This rule, which thus requires a Court, in anticipation of the trial, to estimate the evidence in order to determine whether the "proof is evident or the presumption great," must be my guide in the present instance, and the fact that another magistrate has considered the case, and fixed the amount of bail in his judgment proper, cannot prevent further consideration upon additional evidence by another judicial officer. That a committing magistrate, fully satisfied that a most atrocious offence had been committed and that the party before him was the undoubted offender, should be indisposed to place the bail at such a sum as, while it might in terms fill the constitutional requirements, would still compel the detention of the defendant, is not to be wondered at; nor, with the means for its correction readily available, is such action to be regretted. Of the propriety of the amount fixed by the committing magistrate upon the case submitted to him, I make no question. As this officer dealt with the case as presented to him, so now I shall consider it as presented to me. I do not deem it proper that I should advert to any of the circumstances developed in this case since the original examination. Suffice it to say, that however substantial a case may remain to the prosecution, it is not to-day as conclusive or convincing as when first examined. It is not now a case in which a Judge could justify to himself a practical denial of the right of the party to be admitted to bail upon the ground of the atrocity of the offence and the absolute certainty of the offender. It was objected upon the argument that any reduction of the bail would be construed as an insinuation on the part of the Court as to the merits of the case. If this be a good ground of objection, it must effectually prevent any review of a case with a view of reducing the bail as being excessive. The action of the Court upon a motion of this character neither indicates nor intimates anything as to the merits of the case. It simply repeats the language of every Constitution in the land, that "in an offence bailable by statute, it is the right of the party, not only to be admitted to bail, but to be so admitted in a reasonable amount."

Ordered that the defendant be admitted to bail in the sum of $4,000; the bond to be approved by the Judge of this Court.

HARRIS' FEES.

DECISION RENDERED APRIL, 1881.

By Act of the Legislature, approved February 16th, 1876, certain public officers of Santa Clara county were changed from feed to salaried officers, and the salaries of the officials named established. The Act further provides that these officers, for official services thereafter performed, shall collect the fees provided by the former statutes, and pay the same upon the first Monday of each month to the County Treasurer of Santa Clara county; that the fees so paid shall constitute the fund out of which those officers shall be paid. The Act further provides that any officer named in this Act retaining to his own use any of the moneys required by the Act to be paid into the County Treasury is guilty of a misdemeanor and liable to punishment by both fine and imprisonment. For two years prior to the 1st of March, 1880, N. R. Harris, the defendant, was the duly qualified and acting Sheriff of Santa Clara county.

His official term expired upon the 1st of March, 1880, and his successor was on that day duly installed in the office. During the official term of defendant, many sales of real property were made by him as sheriff, in which the time for redemption had not expired at the close of his official term. After the expiration of defendant's official term, and at the request of the purchasers entitled to sheriff's deeds, the defendant as ex-sheriff made and executed to said parties fifty-three deeds and eleven certificates of sale. For each of these deeds as executed he received from the grantee named therein $3, in all $192.

This amount he has not paid into the County Treasury, but now retains; and for these moneys so received and retained this action is brought. The Act of February, 1876, is in a marked degree special. It contemplates but a single object—the change from fees to salaries—as to the officers named. The terms, powers and duties of these officials are provided elsewhere. As a general rule, a statute thus special, intended for a single purpose, and purporting to provide within itself a complete and entire scheme, will be construed by itself. Indicating, as such legislation does, that but this single purpose was in the legislative mind, its effects will not be enlarged or restricted by other general legislation not essential to its own effective exercise, but the very terms of the Act itself will be taken as furnishing alike the measure of duty and the mode of performance. If we apply this rule of construction to the Act now under consideration, we have it that the officers of the county, the actual incumbents of official position, who are to pay over these fees, are to be compensated by a salary. Ex-officials, former officers, are not referred to. It is urged, however, that as the ex-sheriff is authorized to complete certain processes after his official term, that he is to collect and pay over these fees as he should those received during his actual term. It is not very clear that the ex-sheriff is empowered to make these deeds, but assuming that he is, it is not by virtue of the Act of 1876 that he can exercise these supplementary powers. In that Act no such authority is conferred, but in it is contained all that exists in allegation or right as to payment of fees, namely, reception of salary. If, under this claim of implication or intendment, we interpolate what the Legislature has omitted, we must construe it to read, "all officers and ex-officials shall pay over," etc.

There are many reasons why this construction should not thus be aided by such forced implication. The fact that is to be implied makes that a criminal offence which otherwise it should not be, and that rule is too well established and too salutary to be questioned, that penal statutes are to be neither enlarged nor extended by implication. In the present case, as a cumulative remedy, a penalty of both fine and imprisonment is imposed upon "any officer in this Act named who shall retain or convert to his own use any of the moneys required by this Act to be paid into the County Treasury," etc.

The question as to who is the officer retaining must receive the same construction, whether the proceeding be a civil or a criminal one; and to determine in the present case that the defendant illegally retains this money, is also to decide that he is criminally accountable for the act. Let us test this question of liability by implication or intendment as it would appear in a criminal prosecution, presented either by a decision or in the form of instructions. The Court would be required to hold that the term "county officer," employed in this Act, included a party who is in no official position whatever, and that "fees collected by an officer" would include moneys received by one neither in office nor pretending to be. Implication and intendment that could successfully be carried thus far would have a practical limit. Again, no implication will be found which is against justice and natural right. The statute which provides a salary assures that a stipend, fixed both as to amount and terms, is properly apportioned to the services to be performed. If these duties can be extended indefinitely; if for months after his salary has ceased the ex-sheriff can be compelled to perform, gratuitously, onerous and responsible duties without compensation, it is substantially compelling him to render three years' services for two years' salary, a result most unjust, and at variance alike with the spirit and letter of the Act. Again, recurring to the former statutes referred to in the Act of 1876, and by which the fees of officials are regulated, we find that in terms they prescribe the duties and regulate the compensation of officers as incumbents in office. Nowhere is it provided that any duties are to be performed, or any fees collected, by an ex-official, and it is only by implication, by a forced construction of these statutes, that this authority can be assumed. We have, then, not only in the Act of 1876, but in all the antecedent legislation to which this Act refers, to add, by judicial implication, powers, duties, and obligations of the most important character, and for which no warrant whatever is to be found in the statutes themselves. Again, if by implication, and for the purpose of this action, we are to assume that the defendant is liable as sheriff, by what rule of fairness or construction are we to apply any different rule as to right to draw a salary? The right to the salary and the obligation to pay the fees are in the same Act. The implication which maintains the one applies with even more force to the other, for if by his earnings he is adding to the Salary Fund, should he not be paid for such services? Is not the laborer worthy of his hire? I do not imagine that the salary can be continued beyond the actual incumbency of the official, but if we are to add new rights and obligations by implication, it is not easily perceived why this result should not follow. It was suggested upon the argument that this apparent injustice could be avoided by requiring the defendant to pay the money into the treasury, and then repaying him therefrom for the value of his services. No authority exists for making such payments from the treasury. These moneys can only be withdrawn by the direct authority of the law. And no such authority exists. (See County of San Joaquin vs. Jones, 18 Cal., 328.) Upon the argument of this case much discussion was had as to the duty or power of the ex-sheriff, after the expiration of his official term, to make a deed. The view I take of the case renders it necessary to decide this question. Should any serious doubts be entertained upon this question it can be easily disposed of by the party interested taking the deeds of both the ex-sheriff and the actual incumbent.

All that is determined in the present decision is that, for services wholly performed by an ex-official after the expiration of his term of office, he is not required to account to the County Treasurer.

Judgment for the defendant.

CASE OF HENRY MOODY.

DECISION RENDERED MAY, 1881.

The District Attorney moves the Court to dismiss the informations on file in this Court charging said defendant with the offence of receiving stolen goods, knowing them to have been stolen. This motion is made upon the ground of assurances given to that effect by the officers to Moody for material aid and necessary testimony given by him against Armen and Williams, tried and convicted in this Court of the crime of burglary. Many considerations may be suggested why such assurances of freedom may be advantageously made. The most cogent one why, when made, they should be strictly adhered to, is: By such promises of immunity the officers are enabled to secure evidence absolutely essential to the public security, and often otherwise unattainable.

The knowledge that such a course may be pursued, and that this premium for the disclosure of confidences is thus held out, must have a tendency to deter the criminally disposed from entering into those combinations necessary to the accomplishment of crimes of difficulty or magnitude. It must also act as a constant incentive to those concerned in the crime, whether impelled by fear or penitence, to shield themselves from punishment or make partial reparation by the betrayal of their confederates. As a perpetual reward of the most potent character, it has been universally assented to as one of the most efficient means for the prevention, the detection and the punishment of crime. The objection that by this means one, and often the most culpable, of the party escapes punishment, is easily answered. But for his evidence probably all would escape, to continue with increased confidence their depredations upon the community. Nor is it true that the party who betrays his associates wholly escapes. The brand and shame of his self-confessed guilt is no slight punishment, and he lives the object of constant distrust and suspicion, from which nothing but long years of the strictest rectitude can relieve him. The course pursued by the officers in this instance has the sanction of general and successful usage, and the result in the present instance fully vindicated its application here. Of the persons concerned in this crime, this defendant is the one who, if any was pardoned, should have been selected for that act of grace. The other two were old offenders—State Prison convicts. With them the hope of reformation was much less than for this defendant, answering for his first offence. Had all three been convicted, upon the soundest reasons a severer penalty must have been visited upon the hardened offenders than upon the one who appeared for the first time at the bar of justice. The rule which would have thus discriminated in the punishment must be equally applicable in making a selection for the lenity of the State. If I questioned, however, either the necessity or propriety of the course here pursued, I should none the less give full effect to the promises of the officers. My objections would be in admonitions for guidance in the future, and not by any disavowal or denial of the promises of the past; and by no action on my part should I suffer it to appear that the plighted faith of the State was not as sacred and as certain as the fealty of thieves, and that the assurances of her officers, made in the furtherance of justice, were not to be kept in the full spirit as well as letter of the promise given. I am embarrassed, however, by no such considerations in the present case. The course pursued by the District Attorney meets my full approval. His motion that the informations against the defendant Henry Moody be dismissed, and that he go hence without day, is granted. Ordered accordingly.

CASE OF EDWARD SKINNER.

DECISION RENDERED JUNE, 1881.

In this case it is objected by the defendant that as the answer only denies the residence of the plaintiff upon the premises in question on the 25th day of January, 1881, the date of the filing of plaintiff's declaration, that is an admission that both before and after that day plaintiff was residing upon the place. This is undoubtedly so, and it is equally true that plaintiff might have resided upon this lot on the 24th and 26th of January, and not upon the 25th. Where he resided when he made his declaration is the material fact, not where he had before or might thereafter reside. It is further insisted that as the new homestead was filed upon the same day, and within the hour, that the abandonment was declared, it is evident that the parties did not intend an abandonment, and that none can be found. The difficulty with this is that it is not a question of intent at all. It is a strict statutory abandonment, in which the law declares that the making and filing of a certain declaration shall constitute an abandonment. These parties made and filed this declaration and the statute declares the legal consequence. They can no more qualify the effect of this action by considerations of intention than could the Court declare any other consequence than that which the statute attaches. It is, however, insisted that the plaintiff in sleeping upon the premises at the time the declaration was made constitutes a residence within the meaning of the statute. As found, plaintiff's wife and child slept at his mother's, and all of the family procured all of their meals there. It was admitted by plaintiff that his sleeping at the house was for the purpose of enabling him to file this declaration. Is this the residence that the statute contemplates, and that the cases held must be shown? In my opinion it is not. The residence required by statute is a *bona fide* actual residence. A residence for the purposes and uses of residence we all understand. It is the home of the family, where the ordinary offices of family life have their being. Plaintiff's temporary lodgment for the night in this house had no quality of residence. It was not intended that it should be. It was a studied and purposed effort to substitute part of the letter for the whole of the spirit of the law. With scarce the pretence of a disguise it presents itself as a residence assumed and not established, for the mere purpose of enabling the party to make this declaration. It is unnecessary to cite the cases which hold that actual residence upon the premises is an absolute essential to a valid homestead declaration. In our Supreme Court decisions to this effect are numerous, and are uniform. No citation of authorities is necessary to the proposition that the performances which a statute requires, the conditions which it exacts, are to be performed substantially in the true spirit of the legislative command—that pretexts, subterfuges and shadows will not be accepted for a plain, simple and actual performance. Plaintiff's course was not the performance or the condition exacted by this beneficial statute. It was a plain, palpable and intended evasion of it. It cannot avail the actor. I regret the conclusion to which I find myself compelled in this case. The Homestead Law is a beneficial one, to be upheld for the protection of families. I see no mode, however, of relieving the plaintiff from the consequences of his own mistaken action. The injunction is dissolved and plaintiff's bill is dismissed.

CHAPTER X.

PEOPLE vs. BENJAMIN GIFFORD.

OPINION RENDERED IN JULY, 1881.

MR. CAMPBELL, the District Attorney, moves the Court that the information on file in this Court, charging the defendant with the crime of rape, be dismissed, and accompanying this motion, makes a general statement as to the character of the testimony upon which the State must rely, if this prosecution proceed further.

This statement of the District Attorney repeats substantially what three examinations and the public journals have already called to the attention alike of the Court and the community—that the mental condition of the prosecuting witness is and has been such that no reliance whatever can be placed upon her testimony.

Without repeating them in detail, it is sufficient to say that the contradictions in her several statements, and the very material matters in which she is contradicted, by witnesses of unquestioned character, are so many and so important, that they cannot be reconciled by the most liberal considerations of the lapse of time or the infirmities of memory. They are only explainable as the vagaries of a disordered intellect, and the judgment that thus explains them is certainly as charitable as it doubtless is just. That in any criminal case this mental condition of the principal witness for the State must make a conviction very doubtful, and its propriety very questionable, must be conceded—especially is this the case where an offence of the character here charged, and depending wholly on the testimony of the prosecutrix, is involved.

In the People vs. Benson, 6th Cal., 221, said the Supreme Court of this State, in speaking of these charges:

"There is no class of prosecutions attended with so much danger, or which affords so ample opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenceless. And Courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding. From the days of Lord Hale to the present time, no case has ever gone to the jury on the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the Court warning them of the danger of a conviction on such testimony."

This case was decided in 1856. And this admonition has been reiterated in very many similar cases from that day to the present time. In 46 Cal., passing upon a similar case, the Court cites with approbation "The People vs. Benson," and adds: "A conviction upon such evidence would be a blot upon the jurisprudence of the country, and a libel upon jury trials."—*People vs. Hamilton.*

The same doctrine was again announced in "The People vs. Brown," 47 Cal., 450, and a judgment rendered upon the apparent contradictions in the statements of the prosecutrix. With this, the rule thus emphatically announced by the Supreme Court in cases in which the contradictions did not approach those which attend this case, the District Attorney is fully justified in abandoning a prosecution in which, were a conviction had, it "would be a blot upon the jurisprudence of the country, and a libel upon jury trials."

That the District Attorney pursued this investigation until every clue has been traced out and exhausted was eminently proper. That a charge of this heinous character should be received with apathy, and investigated with indifference, is a suggestion of immunity to others and an invitation to its repetition, and although in the given case it may prove a temporary hardship, it is better for the community that this be suffered than that it be allowed to appear that such charges will not be investigated with exhaustive thoroughness, and prosecuted with unsparing rigor.

That this charge, as originally presented, should have aroused a high degree of popular indignation against the party accused, was quite natural, nor is it to be regretted. It is not a healthful condition of the public mind that contemplates such accusations with indifference. As was said in the People vs. Hamilton: "A charge of so heinous a nature, when supported by even the slightest evidence, arouses in the public mind an intense indignation against the supposed culprit, and it is not surprising that this feeling sometimes finds its way to the jury box."

The interval that has elapsed since this charge was first made has allowed this feeling to subside, and that sober second thought which investigates before it decides, and deliberates before it condemns, has reconsidered its first hasty and indignant judgment of this unfortunate case.

No good can follow from compelling this unfortunate girl to repeat her contradictory and discredited statements upon a further and a fruitless investigation. No satisfactory verdict of conviction could be expected upon her statements. No verdict that a Court could permit to stand, "without inflicting a blot upon the jurisprudence of our Courts."

The motion of the District Attorney, that this proceeding be dismissed, is granted. Let the defendant, Benjamin Gifford, go hence without day.

FLOOD–COLEMAN vs. THE S. C. M. A.

DECISION RENDERED IN AUGUST, 1881.

I am of the opinion that the objection that the bill does not show the capacity in which the Bank of California is made a defendant is well taken. So far as my observation extends, it has been the uniform practice to set forth the particular character of the party, corporation, or co-partners that are made parties to a suit. Many very urgent reasons might be suggested for this practice and this rule. None are now called to mind against it. As a general rule, whenever a party is proceeded for or against in any representative capacity, the practice is to set forth that special capacity, and it is quite apparent that in this case the phrase, "The Bank of California," is not the name of an individual. This, a person "of ordinary intelligence and understanding would readily assume." It probably represents some of those aggregations of individuals who are permitted to proceed in this manner, and think the pleader should aver such facts as entitle him to proceed. The same might be said of the California Powder Works, made by this title a defendant. Were this appellation found anywhere beside in a pleading it would very naturally be taken to describe building, machinery and property, and not as the appellation of persons, either individual or aggregate. The objection is more glaring than in the case of "The Bank of California," and is, in my opinion, well taken. It is objected, however, that this point can only be made by the party imperfectly described. To this it may be replied, that the description may be so radically defective that nobody would be expected or required to recognize themselves under the appellation employed, and that there would be no one to object. But in this case "The Bank of California" appears and makes this specific objection, so that the question is fairly and fully presented as to this defendant at least. I question, however, whether other defendants may not be heard to the same objection. This case may call for marshalling securities, or disposition of surplus, and each of these defendants may prove an interest in seeing that the parties who may share or control the proceeds are properly before the Court. Those properly there will be bound by the judgments to be rendered. They may be interested in the assurance that the estoppel of such judgments shall be mutual and shall bind all.

I think the demurrer upon this ground well taken, and it is sustained. I am of the opinion that the plaintiffs sufficiently set forth the representative capacity in which they sue, and sufficient authority to sue in the capacity asserted.

The demurrer upon this point is overruled. The several demurrers upon the ground of misjoinder of parties-defendant and of misjoinder of causes of action, and that two or more causes of action are set forth and are not separately stated, are all included in one general proposition and will be considered together. The substantial cause of action set forth in plaintiffs' bill, and embracing within its general scope these transactions, is the foreclosure of certain securities held by plaintiffs, and represented in the bonds, shares and mortgage of the Santa Clara Mining Association of Baltimore. Whatever may have been the connection between the antecedent transactions of these parties by the contract of July 26th, 1878, they were all so linked together by allegation, and as security, as to render it absolutely necessary that they be considered as one transaction. A transaction in which Maurice Dore was the immediate dictator, but in which for each and all of his allegations the Santa Clara Mining Company of Baltimore was the security. When such a relation both as to subject matter and security exists as is here shown between these parties, there is manifest necessity for uniting them. I find that there is neither misjoinder of parties nor causes of action, and the demurrer upon these grounds is over-ruled.

Are there two causes of action in this sense that separate statements are required? Much that is stated upon the point last considered applies to this objection. Each of the several transactions runs into and forms an element in all of the others; no one of them would be full and complete both as to right and remedy without taking into consideration parts of each of the others. In my opinion, in such a case, to attempt separate statements would present the facts of the case in each statement in a most imperfect and incomplete manner, and is neither required nor should be permitted. The instances in which several causes of action may be united, and are to be separately stated, are where each of the several causes thus set forth constitutes in and by itself a full and complete cause of action, any one of which could be stricken out or fail without in any degree affecting the rest of the complaint. In the present case no one of the several items thus set forth could be thus eliminated without impairing the fullness and efficiency of that which remains. The objection that these matters, as constituting separate causes of action, are not separately stated, is over-ruled.

The conclusion announced as to the first point renders an amendment necessary. The pleader may deem it prudent to meet the other objections suggested in his amended pleading rather than evoke farther argument.

Demurrer sustained upon the ground assigned, with leave to plaintiffs to amend in such respects as they may be advised.

J. C. BLAND vs. SOUTHERN PACIFIC RAILROAD CO.

DECISION RENDERED IN AUGUST, 1881.

But one point is argued by defendant upon this motion—that the damages awarded by the jury are excessive.

To this plaintiff replies: First—That they are not excessive.

Second—That unless the Court can say that the amount is so large as to indicate passion, prejudice, or corruption on the part of the jury, it will not disturb the verdict on that ground; and counsel for plaintiff is further understood as criticising the decision and opinion of this Court in "DuBois vs. Leahey," as contrary alike to principle and precedent. The language of this opinion to which this exception is understood to be taken is as follows: "In my opinion the test should be this—Having in view all the ends which the due administration of justice seeks to establish, ought the verdict to be permitted to stand?" *Vide* opinion, etc.

With neither the doctrine thus announced nor its application in the given case am I at all dissatisfied, and more mature consideration has but confirmed me in the views then expressed. The objection may perhaps be well taken that it is too general, but it was given as the rule for a special case, and the facts of that case may stand as a practical application and illustration of its exercise. If this rule as there indicated be unsound then the converse of the proposition must be the correct rule. Let us test it by this simple process of transposition: "Although the Court shall be of opinion that, having in view all the ends which the due administration of justice seeks to establish, this verdict ought not to be permitted to stand, yet these considerations will not justify the disturbance."

Between the rule as declared and its converse as above indicated, I, at least, have no difficulty in choosing. Without further consideration of this former opinion, I shall now consider the argument so confidently asserted, "that only corruption, passion, or prejudice will authorize a Court in setting aside a verdict as excessive." It has been more than once suggested by the Supreme Court of this and of other States that the phraseology of ancient decisions has often been retained when the changed conditions of the times made their use quite inapplicable. In the hesitation with which judges in the days of Lord Kenyon questioned the verdicts of juries may be found the cause for the extraordinary reasons assigned, and upon which alone the Courts felt justified in interfering. From the reports, this phraseology very naturally passed into the statutes with all the infirmity of expression that attended it in the decisions, meaning neither more nor less as a legislative command than as a judicial exposition.

As it is with the terms *passion* and *prejudice* we are now dealing, let us consider the sense in which they are employed. Prejudice is defined by lexicographers "as a bias favorable or unfavorable without reason." "A leaning in favor of one side of a cause for some reason other than its justice."—Worcester's Dictionary.

Thus defined, the term prejudice naturally includes within its meaning all considerations of a purely personal character, such as the incitement of hatred, friendship, or the like, as these must give a bias for or against a party wholly independent of the merits of the controversy. The term "passion" cannot be taken as including considerations so clearly embraced within the meaning of prejudice. Used as it is in addition to and in connection with the other phrase, it must be assumed to express something other and different from the term to which it is thus an adjunct. It is defined as mental emotion. In the sense in which it is here employed, I understand it to mean the offspring of sentiment or sympathy, as contra-distinguished from the results of logic and reason as attained by the just comparison and estimate of causes and consequences. Test this as a definition by the purposes and course of a civil litigation. The purpose of such a controversy is simply reparation. An aggrieved party seeking compensation for a wrong suffered. Except in the special cases in which punitive damages may be allowed, it is and must be a mere question of estimate, the measure of injury determining the amount of damages to be awarded. If any other considerations than those which proceed upon this basis are entertained and acted upon by the jury, they are disturbing and improper elements, and in whatever source or motive they originate, may well be regarded as the exhibition of passion as contra-distinguished from reason, deliberation, and just and fair comparison.

That in certain cases this matter of apportionment may be difficult, and that different persons may differ widely as to amounts, does not change the nature or course of the inquiry. The same variety of opinion will be found as to almost any question outside the exact sciences. As matter of compensation it is necessarily a question of computation, and the data—the premises from which this is to be made—the facts of the case—must be the same for whoever is called to deal with them, Court or jury. But it is said, though this is so, yet the Court can only overrule the conclusion of the jury when the verdict is so excessive as to appear to be the result of "passion or prejudice, so outrageous as to shock the sense of a reasonable person at first blush; such as all men would at first blush condemn as outrageous."

These are a few of the many emphatic if not instructive expressions by which the pathway of a Court is supposed to be enlightened while upon this inquiry, and with all deference to the eminent judges who have employed them, what do they mean, what can they mean, other than this: that the Court, upon a full and just consideration of the facts passed upon by the jury, a comparison of the case made with the amount awarded, is thoroughly satisfied in his own mind that the damages are much more than any reasonable, fair-minded person would have awarded, or than should have been given; not that the Court as an individual would not have given as much, but that no dispassionate arbiter would have so done.

Such a conclusion would be not far from determining that something unlike *cool* dispassionate consideration had influenced the jury, and might as a necessary deduction bring the case within the rule contended for. If this is not the standard where is it to be found? How is the Court to know that it "*shocks* at first blush the sense of *all men*, except as it shocks its own"? That it is outrageous, except as it outrages the judge's sense of justice and of right?

Who is to estimate and apply these adjectives of aspersion?

There can be for this but one means and one mind; the facts of the given case and the judgment of the Judge; none other are attainable or possible.

Again, say the cases, the verdict is excessive "when so large as to indicate passion or prejudice." That is, the Court is to determine that it is excessive because it indicates passion, and that it indicates passion because it is excessive. Of what value for the purposes of logical deduction can be a statement in which the *premises* and the *conclusion* are taken as exact equivalents? What aid in interpretation where the terms to be defined with and by are thus transposable?

Without further following this line of examination, how stands the case upon precedent? That there are a multitude of cases in which the stereotyped forms, "*corruption*," "*passion*," and "*prejudice*" are employed, may be conceded. There are also many in which these phrases and their spirit have been alike disregarded.

In Henlett vs. Cruchley, said Lord Mansfield: "It is now well acknowledged in all the Courts that, whether in actions for criminal conversation, malicious prosecution, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury." (5 Taunton, 277.)

In Massachusetts, said Parker, Chief Justice: "We entertain no doubt of the authority of the Court to set aside a verdict on account of the largeness of the damages. It is an authority, however, which ought to be exercised with great caution and discretion; but whenever the Court is satisfied that there is no reasonable measure between the injury and the compensation, it is their duty to submit the case to another jury. In cases of tort it may be difficult to settle the measure of just damages. But still, if there be not a correcting power in the Court, great injustice may be done under the influence of the purest motives; for jurors are liable to have their passions excited on questions of personal liberty and right, and it is by no means interfering with their proper authority to give opportunity to a party to be heard before a second jury, when, from the interval of time and other circumstances, a more cool and dispassionate investigation may be expected to take place. (Sampson vs. Smith, 15 Mass., 365.) When the damages found by the jury are either so large or so small as to force upon the mind of every person familiar with the circumstances of the case the conviction that by some means the jury have acted under the influence of a perverted judgment, it is the duty of the Court, in the exercise of a sound judicial discretion, to grant a new trial." (Collins vs. A. & S. R. R. Co., 12 Bart., 492. See also Walker vs. Martin, 43 Ill., 514. 83 Penn., 335.)

In our own Supreme Court, verdicts seem to have been set aside upon the simple consideration that the damages awarded were unsatisfactory to the Court. In 24 Cal., say the Court: "A verdict will not be disturbed unless the amount of the damages is obviously so disproportioned to

the injury proved as to justify the conclusion that the verdict is not the result of the cool, dispassionate judgment of the jury." (Aldrich vs. Palmer, 24 Cal., 516.) In this case the verdict was not disturbed.

As I read this opinion, an obvious disproportion between the estimate of the Court and of the jury indicates "passion" upon the part of the latter. In Turner vs. S. R. R. Co., and Pleasants vs. S. R. R. Co., two actions brought by colored females for being expelled from a street car in San Francisco, in the first the jury awarded $750 damages and in the second $500. Both these verdicts were set aside as excessive. (34 Cal.) As these actions were manifestly brought to establish the rights of a race and the effect of an amendment to the Constitution of the United States, and the amounts awarded were but a little more than enabled these cases to be brought before the Court of last resort in this State, it may be doubted whether, in view of all these circumstances, an amount necessary to accomplish these purposes should be regarded as "so outrageous as to at once shock all mankind," and with all deference to the tribunal which so determined, I may add that it apparently did not shock the judicial sense of the Judge who tried the case; nor does it now produce that measure of judicial emotion in the writer of this opinion.

In Tarbell vs. C. P. R. R. (34 Cal., 623), a passenger upon the C. P. R. R. train was wrongly ejected from the train five miles from his home and twelve miles from his destination. The jury awarded the plaintiff $500 damages. Said the Supreme Court: "We think the verdict greatly disproportioned to the injury proved within the rule in Aldrich vs. Palmer. (24 Cal.) A new trial granted, unless within fifteen days the plaintiff elect to take a judgment for $100, which sum we think amply sufficient compensation for the injury which he has sustained." In this case, at least, there is no assumption of passion or prejudice upon the part of the jury. The Court simply compare the injury sustained with the damages awarded, and the Judge being of the opinion that they were greatly disproportionate declares them excessive. A plain case of the Court upon the facts of a case substituting its conclusions as to compensation for those of the jury. Why the Court should have awarded $100 is not so apparent. There is nothing to show that plaintiff was injured otherwise than in a few hours' delay, and for this $5 would have been an ample equivalent. Upon the case presented there was as much to warrant the jury's verdict of $500 as the Supreme Court award of $100. The case shows that the Supreme Court, in considering a question in which the damages were not merely compensating, had no hesitation in striking $400 out of the estimate of the jury.

I do not refer to these decisions in any spirit of cavil or criticism. I concede the right as well as the duty of the Court to review verdicts and to determine their justice by comparing the amounts awarded with the case proven, and I cite them as instances in which the Court must have judged for itself the range within which the sound, deliberate judgment of men might fairly differ, and when it found the verdict overstepping those limits not hesitating to set it aside. If there be any other rule practicable or possible I am not aware of it. This rule I shall now endeavor to apply to the case in hand.

That the plaintiff was ejected from defendant's car is admitted; that he was so removed before the money he had paid was tendered back may be taken as established by a preponderance of proof. The degree of force employed was in dispute. In view of the fact that the removal was unlawful, this question is only important in its bearing upon the physical injury alleged to have been sustained by plaintiff. Were the removal of plaintiff from the car—the fact of his expulsion—all that was involved, upon the authority of Pleasant vs. S. R. R. Co., Tanner vs. S. R. R. Co., Tarbell vs. C. P. R. R. Co., above cited, the damages are grossly disproportioned to the injury, and the verdict undoubtedly excessive; but in this case the plaintiff claims that injury to his spine resulted from this removal, and many witnesses were called both as to apparent health and occult disease indicated by symptoms testified to principally by the plaintiff himself. If these symptoms and sensations existed as testified to by plaintiff; if the conclusion drawn from these and from personal inspection by the medical experts was correct, the jury were justified in believing that plaintiff had sustained a very serious and permanent injury, involving very material physical impairment. That much of the evidence upon which the medical experts predicated their opinions was the symptoms and sensations narrated by the plaintiff was the fact in this and must be in all cases in which the derangement or condition of any internal organ is involved. As to the external and ocular evidences the experts differed. It was for the jury to determine what weight they would give plaintiff's statement as to his physical condition, and also the consequent value of the

medical opinions based upon these statements. Had the plaintiff been thrust from the car upon a stake and thereby immediately and unquestionably mutilated, this fact, and the consequent impotence, would have been readily established; that the same result follows from a more remote or obscure cause may make the inquiry more intricate, the proof more difficult; but these met, the result must be the same. I find no warrant for disturbing the verdict, upon the question of either the fact or extent of plaintiff's injury. Assuming then this to be the injury, this its present and prospective effect upon the plaintiff, is the amount of $7,500 awarded by the jury excessive?

In approaching this question it must be borne in mind that I am now to consider permanent spinal injury as a fact as fully established as though apparent dislocation instead of obscure concussion were the injury. Without going into further detail, it may be stated that the medical witnesses all agree that from such an injury follows mental and physical impairment of a permanent and generally progressive character; that by it many of the functions may be disturbed or wholly arrested; and that a train of probable consequences of the most serious character may be reasonably anticipated from such an injury. If this be the plaintiff's actual condition any mere money judgment must prove an imperfect compensation, and in the amount here awarded I am not prepared to say that the jury went beyond those bounds within which the opinions of the deliberate and the fair-minded are permitted to differ.

The motion for a new trial is denied.

PEOPLE vs. SEPULVEDA.

DECISION RENDERED SEPTEMBER, 1881.

These defendants were jointly indicted in the late County Court of this County for the crime of grand larceny; and were tried together in said Court upon this indictment. The jury rendered a verdict reading as follows: "We, the jury, find the *defendees* guilty as charged in the *inditisment*." The clerk in reading this verdict corrected the orthography by writing the word *defendees* defendant. Upon appeal to the Supreme Court by Sepulveda, it was determined that the record of the clerk must be taken as the verdict rendered. "And as there were two defendants on trial, a verdict finding the *defendant* guilty without specifying which of the two defendants, was void for uncertainty." Upon the coming down of the remittur in this case a motion was made upon the part of the defendant Sepulveda, that he be discharged upon the grounds:

First.—That he was in jeopardy by the former trial, and as the discharge of the jury was unauthorized and illegal, he was released thereby.

Second.—That by this verdict, and the construction of it by the Supreme Court, one of said defendants has been acquitted, and as it cannot be made to appear which was acquitted, either are entitled to the benefit of the presumption of acquittal.

It is settled law that a verdict in a criminal case must be complete in itself, and can neither be aided nor construed by any extrinsic light whatever, nor after the jury has rendered a verdict and been discharged from the case can they be recalled for the purpose of making any correction or explanation. What is the effect upon the rights of this party of a verdict accepted and the jury discharged, when the verdict is "void for uncertainty"?

The People vs. Cage, 47 Cal., 324, was a trial for murder. After the jury had been out several days, the Judge, without bringing them into Court and questioning them as to the probability of their agreeing, made the inquiry through the Sheriff, and being informed that there was no probability of an agreement, without making any further order in the matter, adjourned the Court for the term. Held by the Supreme Court, that the adjournment of the Court discharged the jury, and that this mode of discharging a jury, without examination by the Judge, was unauthorized and unwarranted, and operated as an acquittal of the defendant, and that he was entitled to his discharge. In the People vs. Ah Yi, 31 Cal., 451, the defendant was indicted and arraigned by the name of "Ah Yi." The jury returned a verdict as follows: "We, the jury, find the said 'Ty Chin,' a Chinaman, guilty." Held by the Supreme Court, that this was finding that "Ah Yi" was not guilty, and that he was entitled to a discharge. To the same effect are all the cases and authorities to which I have had access, and the same rule is declared by our Code—that if the jury persist in returning an informal verdict the Court must render judgment of acquittal. With this the rule alike of the Code and of the cases, it is impossible to see how this defendant can be proceeded against further. A jury, regularly empaneled and charged in the case, has returned a verdict which the Supreme Court determine was "void for uncertainty." This, under the section of the Code above quoted, entitles the defendant to a discharge. But this uncertainty goes further than making the action of the jury doubtful or obscure; it is an absolute acquittal of a "*defendant*," and that without designating which of the two then upon trial was acquitted and which was convicted. By what means and through what methods is the Court to supply this defect? Were the members of the jury interrogated upon this matter, they would doubtless explain that they intended to find both guilty; but this the Supreme Court says they have not done, and this construction has become the law of this case, and besides, as I have already shown, this verdict cannot be thus aided. It must stand or fall by its own reading. By that interpretation but one of these parties, and that one unnamed, is convicted. Had the verdict said: "We, the jury, find the *defendant* not guilty," it would have been certain that one defendant was entitled to his discharge. It was for the jury to say which. Their failure to so designate will neither permit the Court to take the place of the jury in supplying the deficiency, nor will it deprive the party thus acquitted of the benefit of this verdict.

I see no escape from the conclusion that the defendant is entitled to his discharge under the verdict returned in this case, and it is so ordered.

R. B. BUCKNER vs. THE COUNTY OF SANTA CLARA.

OPINION RENDERED OCTOBER, 1881.

The facts of the case conceded or proven show this: That R. B. Buckner, Esq., is and for over a year past has been a duly elected, qualified and acting Justice of the Peace of San Jose Township. That during that period there have been brought before him one hundred and sixty-six complaints for offences classed as misdemeanors, under the Penal Code of the State, and that these offences were committed within the limits of the municipal corporation of San Jose. That the corporation of San Jose, as to both area and population, is but a portion of the Township of San Jose. That under the general Fee Bill regulating the compensation of Justices of the Peace, plaintiff would be entitled to receive from the County of Santa Clara three dollars for each statutory misdemeanor brought before him. That he has presented his claim for this allowance, amounting to $501. to the Board of Supervisors of the county, and that the same was wholly rejected, it being objected by the Board then and now, that as the services were rendered in cases arising within the corporate limits of the City of San Jose, compensation must be made from the City Treasury. Several cases involving the jurisdiction of the City Justice have been before the respective departments of this Court, and it is insisted in these cases conclusions were announced determining the present question adversely to the plaintiff. In *ex-parte* Williams the question presented was this: "Had the City Justice police jurisdiction—Could he act as Police Judge, or hold a Police Court, within the City of San Jose?" An extended examination and comparison of the various provisions of the Code and of the City Charter was made by both the Judges of this Court, and the conclusion reached that he could not. Neither the facts nor the controversy had in that case called for any further determination. Nor was any had, and while, from the opinions stated, it may follow as a natural, perhaps necessary, deduction that a Justice of the Peace of San Jose Township was competent to discharge the duties of Police Judge, there was no such determination, and certainly no intimation as to the capacity in which he might exercise his general jurisdiction within the city proper, or the measure or mode of his compensation. In the People vs. Ah Hoch, before the Judge of Department No. 2, the same question was presented, and the rule announced in *ex-parte* Williams was repeated and enforced. In Department No. 1, the question came up again in *ex-parte* Carrillo, and without further discussion the Court adhered to the two decisions above named. Nothing was presented in the two latter cases that was not involved in *ex-parte* Williams, and no more was decided. DeLacy vs. the County of Santa Clara was tried in Department No. 2. No written opinion was filed, but I am informed by my associate that his decision was based upon grounds which in no way militate against the present conclusions. These are the cases relied upon by the defendant, and neither in effect nor by implication have they any bearing upon the case now in hand. With that case I now proceed.

Judge Buckner is a Justice of the Peace of San Jose Township; his powers and jurisdictions are declared by the Code as follows:

"The Justice's Court shall have jurisdiction of the following public offences committed within the respective counties in which such Courts are established:—

"First.—Petit larceny.

"Second.—Assault or battery not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the offence a felony.

"Third.—Breaches of the peace, riots, affrays, committing a wilful injury to property, and all misdemeanors punishable by a fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both such fine and imprisonment." (Amendments Code of Civil Procedure, 1880, Page 36.)

Under this section of the Code, without further authority, plaintiff, as a Justice of the Peace of the Township, has jurisdiction of all the offences for which the charges now in question were made. In what respect and by what means has that jurisdiction been interfered with? By Section 418 of the City Charter it is provided: "Justices of the Peace of San Jose Township are hereby declared competent to discharge all the duties of Police Justice for the City of San Jose, and for all services and proceedings before a Justice of the Peace in a criminal proceeding or action arising under the provisions of this Act, or of any ordinance which may now or hereafter be in force in said city, he shall have and be entitled to receive from the City of San Jose one dollar and fifty cents, payable out of the General Fund, and all fines imposed by such Justices for any breach of the peace within the corporate limits of the City of San Jose, or for any violation of the city ordinances, shall be paid into the City Treasury and placed to the credit of the General Fund; and it is hereby expressly provided that no demand shall be allowed or warrant drawn in favor of any Justice of the Peace who shall fail to pay into the City Treasury the fines collected in criminal cases where the crime shall have been committed within the corporate limits of the City of San Jose, when such crime by law is punishable by fine, and which fine, if paid, would have, under the provisions of this Act, been justly due and applicable to the General Fund of the city."

Section 49 provides that in the event of the Justices of the Peace of San Jose Township failing or refusing to perform the duties of Police Justice as by this Act required, it is made the duty of the Mayor to hold such Court, with the jurisdiction and compensation given to such Justices.

The Charter of the City of San Jose makes no provision for a Police Justice, and we turn to the Political Code for the jurisdiction and powers of these officers. Section 4,426 of the Political Code repeats nearly *verbatim* the provisions above quoted pertaining to Justices of the Peace, and to these adds "of proceedings respecting vagrants, lewd or disorderly persons; of all proceedings for the violation of any ordinance of the city, both civil and criminal." Of all these matters the Police Court is given exclusive jurisdiction within the city boundaries. From this it will be seen that as to the offences making up plaintiff's demand, he would have the same jurisdiction whether proceeding under the power given by the State, or that conferred by the Charter. Under which of these authorities is he to be taken to have acted? A careful examination of Section 48 of the Charter shows that it was contemplated that he might be acting within the city limits in both capacities. It is "in a criminal proceeding or action arising under the provisions of this Act, or in any ordinance in said city, that he is to receive from the city, etc." There are and can be no other criminal proceedings under this Charter than such as are created by ordinance, so that in effect this paragraph must be read as though only "ordinances" were referred to.

Second.—"For any breach of the peace within the corporate limits, and for all violation of city ordinances, the fines are to be paid into the City Treasury and placed in the General Fund."

No provision is made for fines collected for other offences, petit larceny and the like, which are neither breaches of the peace nor violations of ordinances, manifestly indicating that these are to be paid as provided by the Code into the County Treasury, and the last paragraph of this section repeats the suggestion of this dual jurisdiction by providing that: "Such fines are to be paid by the acting Justice into the City Treasury as would, under the provisions of this Act, have been justly due and applicable to the General Fund of the city." It does not admit of question that moneys collected from fines by the Justice in the great majority of cases be paid into the County Treasury, and it is certainly but just that the fund which receives the revenue shall meet the corresponding expenditures. So in the recent case of Jenks vs. The City of Oakland, September, 1881, says the Court: "We are of the opinion that it was the intention of the Legislature that the salary of the City Justice should be paid by the city. This intention is in our judgment clearly manifested by the requirement that the fees of the office collected by the Justice are to be paid into the City Treasury." Again, in Pillsbury vs. Brown, 47 Cal., 481. Pillsbury, as District Attorney of San Joaquin County, sued to recover a fee of $15 for a conviction had under the ordinance of the City of Stockton. Says the Court: "We think that the Statutes of 1869-70, fixing the fees of District Attorneys for conviction had for misdemeanors committed, referred only to such as are defined by the general public law of the State, and not to convictions for the breaches of mere local municipal ordinances. The people of the State have no interest whatever in the fines collected for the breaches of city ordinances, these go into the City Treasury, entirely under the control of the city authorities, and the District Attorney of San Joaquin is an officer of a corporate organization entirely distinct from that of the City of Stockton. We think that a result so inequitable could not be reached except by a misconstruction of the Statutes." A very emphatic declaration that the fund which is to receive the fine is to make the compensation. Passing this feature of the argument, what is there in Section 48 of the Charter that militates against this construction? "Justices of the Peace of San Jose Township are hereby declared to be competent to discharge all the duties of Police Justice of the City of San Jose." Certainly this language does not make them Police Justices, as defined in the Code; if it did, very important and expensive consequences to the city would follow. The manifest purpose of this section was to give to the Township Justices, as such, a power which they would not have otherwise possessed, that of trying offences arising under city ordinances. It did not require the authorization of Section 48 to enable him to try statutory offences. That power was given by the Statute. It did to enable him to try breaches of city ordinances, and this was given. Let this question be presented with the County a claimant, with fines received by plaintiff as Justice of the Peace, for convictions for petty larceny. The Statute commands him to pay these into the County Treasury. The Charter makes no provision for their being paid anywhere. Could there be any question that the Statute must be obeyed? If the defendant's position be correct in such case, while the fine must go into the County Treasury, the fees of the Justice for trying the case must be paid by the city. As was said in Pillsbury vs. Brown, above cited, "So inequitable a result can only be reached by a misconstruction of the Statute." Such construction I am not disposed to give. An examination made of the various Statutes relating to this question indicates that the legislation was not made with a very careful comparison of existing Statutes, and much that is at least ambiguous is apparent in the several sections of the Codes and Charter relating to this question. That there may be no misapprehension as to the scope of this decision, it determines only this: That for crimes created by Statute and tried before a Township Justice of the Peace, though the offence was committed within a municipal corporation, the Justice's fees are as regulated by the Statute, and are to be paid from the County Treasury.

From these conclusions it follows that plaintiff is entitled to judgment against the defendant for $501 and costs of suit, and it is so ordered.

CHAPTER XI.

GAS CO. vs. JANUARY (COLLECTOR).

DECISION RENDERED JANUARY, 1882.

UPON the close of plaintiff's case a motion was made by defendant for a non-suit, upon the grounds:

First.—That the payment made by the plaintiff was voluntary, and not under any duress or compulsion.

Second.—That the tax in question was justly due and payable, and that in such a case a party paying that which he is under a moral and equitable obligation to pay, cannot recover back upon technical grounds that which was justly due to the party receiving it.

Third.—That the tax in question was legal and properly assessed, and that the defects complained of are not such as affect the validity of the tax, as a charge upon the property of the plaintiff.

The Court reserved its ruling upon the motion for a non-suit. The defendant offered no testimony and the case was submitted. It is shown that for the fiscal year of 1880 there was assessed to the plaintiff, by the Assessor of Santa Clara County, certain property embracing real estate described as town lots and improvements, and property classified as personal property, and under a special heading, the following: "San Jose Gas Company—street mains, etc., $40,860; franchise, $130,000." Following this entry, under appropriate headings, the amount of the tax upon each of these matters of property is carried out. In the certificate of the Auditor which accompanies this book is omitted the words "as corrected by the State Board of Equalization." In the assessment the character and location of the "street mains" is not given, nor are they designated as being real or personal property, or as improvements upon either. In the advertisement of this property as delinquent in one of the four issues of the newspaper in which this list was published (the second issue), this by an inadvertence of the printer is under the heading "Gilroy Township." In the three other issues it is properly located in San Jose Township. The original assessment appears in two distinct volumes. The affidavit of the Assessor is appended to the second of these volumes only. In the book in which this assessment appears it does not follow in its proper alphabetical sequence; but follows the letter "E" in said book. Other objections are suggested, but these are the principal ones relied upon both by plaintiff and defendant: by the first as showing that no valid assessment was made, by the latter as showing an assessment and proceedings so fatally defective that no duress could arise therefrom. Besides these matters appearing upon the assessment roll, it was shown that the defendant had advertised this property for sale under this assessment as delinquent; that he was offering it for sale at the Court House door; that the plaintiff had paid the tax upon the real property assessed to it, and that it protested to defendant against this sale upon the ground that its title to this property would be clouded thereby; that notwithstanding said protest defendant did offer said property for sale, and the same was then bid in upon account of plaintiff; that the defendant would have issued a certificate of sale to the purchaser of said property, as in the case of ordinary purchases of real estate, and would one year therefrom have issued a deed upon said certificate, had no redemption been effected. It did not appear that there had been any seizure or taking into possession of either said street mains or said franchise by defendant, or that the same was in sight at the time of said sale, or that the defendant designated the same in any other way than as appeared by the terms of the assessment, or delivery than the execution of the certificate. As already stated, the plaintiff had paid in full the tax upon the town lots, and upon all the actual land by it owned, and to it assessed as such, before the offer to sell by the defendant or the protest by the plaintiff. For the purposes of this decision I shall assume what the assessment roll does not show:

First.—That the words "street mains" mean the street mains by which the gas of plaintiff is conveyed to its customers;

Second.—That the character "&" following these words means nothing;

Third.—That the word "franchise" means but one right or privilege exercised by the plaintiff, and that no other is or could be possessed by it.

With all these assumptions and intendments, would the defendant's action, if fully carried out, have disturbed the plaintiff's possession, endangered its ownership, or clouded its title? The defendant was treating these mains and this franchise as real estate, which they were not. They are personal property. (See People vs. Assessors of Brooklyn, 39 N. Y., 81; Memphis Gas Co. vs. State, 6 Cald. Tenn., 310; Commonwealth vs. Lowell Gas Co., 12 Allen, 75; Commonwealth vs. Hamilton, 12 Allen, 298; 6 Wall, 632.) So with the franchise, whatever it may be, it is certainly not real estate. It is a mere right or privilege conceded by the political power to do a given thing. It is either real or personal estate. Either or both are necessarily required in its exercise. And this privilege, thus intangible, was also offered by the defendant and treated by plaintiff as real estate, as such was to be sold. By such proposed sale was the interest of plaintiff prejudiced? In my opinion there was no action either taken or proposed by the officer which affected the ownership of this property. The sale of personal property by an officer in this, as in all other cases, requires as a condition precedent the seizure, the taking into actual possession the chattel to be sold. Such action is, as a rule, an absolute essential to the sale of personalty, and that it is required in tax sales is evidenced by the several provisions of the Code relating to this subject. (See Pol. Code, Secs. 3790, 3793, 3794, 3821, 3882.) These provisions clearly indicate a seizure, and a delivery must of course depend upon the nature of the thing to be delivered. In the case of iron pipes in place, like that of any other form of bulky or unwieldy property, any of the symbolical forms recognized by the courts would suffice. But something in the nature of a seizure and a delivery must be made or intended. In the present case no such seizure was made, no such notice as is required for the sale of personal property was given, no immediate bill of sale to the purchaser or delivery to him would have been made, but both the collector and plaintiff were proceeding upon the theory that these mains and this franchise were real estate. In my opinion the collector had no more power to advertise, offer, and sell this as real estate than he would have had to offer real estate and dispose of it as personalty. The rules by which these classes of property are transferred as between individuals are essentially different, and the tax collector has no larger authority than has the citizen. As has been often said of these officers: "Form becomes with them course of procedure; substance and mode the measure of authority." (Guin vs. O'Connell, 54 Cal., 522.) In this case the defendant was proposing without a seizure, without giving the notice required by the Statute, without giving a bill of sale, without making a delivery of the chattel, to transfer the title of the plaintiff to a bidder, If such a sale could be upheld, so could a similar course of procedure with a stock of goods, a herd of sheep or of cattle, or any other property of the most transitory character, and the confusion that must follow from such practice can hardly be estimated. Another objection derived from the operations of the revenue law itself may be suggested. If for the taxes of the current year the personal property when sold is not then delivered, what security has the purchaser against the tax levied for the ensuing year, or how can the State in justice sell the property for such subsequent delinquency? It is the latest sale that prevails as to titles acquired under tax sales. This must from the necessity of the case be the rule. And so it was held in Anderson vs. Hyde, 46 Cal., 135. It is made the duty of the Assessor to collect the tax on personal property, when there is no lien upon the realty for its security, when he makes his assessment, and this is done by an immediate sale and delivery. If then the purchaser at a sale of personalty cannot have either a bill of sale or a delivery of the property for one year (as would have been the case here), he will have his interest under the purchase lost by the subsequent levy, when he could protect himself neither by paying the tax nor by any other proceeding. So if intermediate to the sale of one year, and the tax levy for the succeeding year, the property is removed to another county, it is liable for the succeeding tax in such county. And if so, there as here, the same result would follow, that the purchaser would take nothing by his bid, while in the first county, in which a valid sale and delivery was effected, the right of all former purchasers would be hopelessly lost before they were even in a position to protect themselves. It is unnecessary to add that such a practice would be utterly fatal to the revenue system as applied to personalty, and no construction which would lead to such consequence can be upheld. Another objection made by the defendant is this, that as plaintiff has paid a tax due in equity and justice from him, he will not be permitted upon a mere technicality, or for an irregularity, to recover back what was justly due from him. Many cases are cited which maintain this principle, notably that of Goddard vs. Seymour, 30 Conn., 397. The conclusion I have reached upon the first point discussed, that the defendant was proceeding in a manner wholly unauthorized by law, and which would neither have transferred the property nor affected the ownership, renders it unnecessary to discuss this proposition, or the other objections I have stated.

Non-suit granted.

YOELL vs. CHRISTY.

DECISION RENDERED FEBRUARY, 1882.

The plaintiff commenced this action in the Justice's Court by filing as his complaint a copy of his account. To this the defendant answered in writing with a general denial. Judgment was rendered for the defendant and the plaintiff appealed. Upon the trial in this Court the defendant offered to prove that the services performed by plaintiff for defendant were upon a specific contract, and that according to the terms of this special contract plaintiff was to look to the judgment he might obtain for the defendant and to that alone for consideration. To the introduction of this testimony the plaintiff objected upon the ground that this as a defence was not specially pleaded and was not admissible under the general denials of the answer. This objection was sustained, the defendant excepting. A verdict was rendered for the plaintiff and a motion for a new trial was made on the ground of error in the exclusion of the testimony above stated. The ruling of the Court in excluding this evidence was error. At common law, under the general issue, the defendant could always give in evidence any special contract by which he seeks to recover. By gradual and illogical enlargements of this rule much that was formerly matter of avoidance was admitted under the same plea. That a special contract could thus be introduced was no departure from the most ancient doctrine, and has always, and uniformly, existed in practice. The soundness of this rule is obvious. The general denial put the plaintiff upon proof of every material allegation of his complaint. Whatever he was required to establish the defendant, of course, might controvert. He could show that he had never contracted with plaintiff at all, or that he had so contracted with him that no legal action had as yet accrued to him. The evidence that a special contract was entered into between the parties tended to disprove the general one relied upon by the plaintiff and to defeat this action. It is not the case of a party seeking to recover upon a special contract, but of a party disproving the contract sued upon by showing that that was never the contract of the defendant but an altogether different one, upon which no liability had accrued. It was insisted upon in the argument that the Code had introduced a different rule, and under this impression the ruling was made upon the trial. Further consideration has satisfied me that the Code has in no respect changed the practice in this regard, and the case of Schemmerhorn vs. Van Allen, 18 Barbour, N. Y. Supreme Court, is a direct authority upon that point. The facts of that case are in no respect distinguishable from the case at bar, and it was then held that, under the Code, defendant could give in evidence, under the general denials of his answer, a special agreement as to compensation. The case from Barbour is referred to with approval in the text of all the late works upon Code pleading. I see no reason for questioning its soundness. It is claimed, however, that the doctrine of this case has not been followed in this State, and decisions are referred to, notably Piercy vs. Salin, 10 Cal., 22, in which it is claimed the opposite doctrine is maintained. These cases generally present the question of confession and avoidance, manifestly new matter as it is, admits that upon the contract sued upon plaintiff has had a cause of action, but this, as a legal conclusion, has been avoided or defeated by some proceedings subsequent to the creation of such allegation. Such a defence admits all that the plaintiff alleges, and then sets up such matters as avoid its legal effect. The general denial traverses the very contract, and upon and under it anything may be given in evidence which tends to make that denial good. It is insisted, however, that the bill filed as a complaint, and setting forth that the services sued for were for going to Santa Cruz at defendant's urgent request, changes the case, and that the general denial only traverses this fact: that plaintiff made this journey at defendant's request.

The fact that a plaintiff is permitted to plead in this informal manner in a Justice's Court does not deprive his adversary of the right to show in the same form and by the same plea the matters of defence which could have been availed of in the highest Courts and under the most rigid rule of pleadings. I have no doubt that the exclusion of this evidence was error, manifestly prejudicial to defendant.

The verdict in favor of the plaintiff is set aside and a new trial ordered, costs to abide the event of the suit.

LEAHY CASE.

DECISION RENDERED FEBRUARY, 1882.

The principal grounds relied upon by defendant are that the verdict is not sustained by the evidence in that no want of due care was shown on the part of the defendant; and second, that William Leahy, for whose death this action is brought, was guilty of contributory negligence in the use of a wooden lever or club in setting the brake at the time the same was broken. It was, if not admitted, substantially proven that this brake had a flaw, and that through this flaw passed the line of ultimate fracture. It is, moreover, insisted that the experiments with similar wheels with much more extensive flaws, made before the jury, demonstrated that this wheel, even with this defect, was much stronger than was needed for any proper usage or service to which it could be applied, and that the fact that it did break tended to prove improper usage on the part of Leahy. It may be well questioned whether the efforts of two or three men upon a brake wheel attached to a rod two or three feet in length, and secured to a rigid platform, is as severe test as when a similar brake wheel is subjected to the twist and tension of a rod eight or nine feet long and subject to the jerks and concussions which necessarily result from the catching and loosening of the brake upon the uneven surface of the car wheel. The steady and elastic pressure of human muscles is a very different thing from the same pressure supplemented by the shock of a suddenly arrested car wheel. It is in a great measure the difference between pressure and concussion, and the difference between these forces is well known, if not always accurately estimated. It was an imperfect wheel. It broke at a point where, if its material were properly distributed, it should not have broken—in the line of the flaw. I think it was for the jury to determine whether this wheel, thus impaired, was sufficient for the purposes for which Leahy was required to employ it. The question as to the use of a club or lever by Leahy to set up this brake is in even more doubt. That he had a club, that he carried it on the train, and that he often used it, was well established. That he used it on this occasion was substantially disputed. The fact that this club was not found at the place of the accident till many hours later, and then found in so open and conspicuous a place that it ought not to have escaped the most careless searcher, makes this discovery of the club a very equivocal factor in the case, while the fact that L. Lewis, who claims to have found the club, made propositions to plaintiff's attorney that are certainly equivocal and significant, still further impairs the finding. If the club was not in fact upon the ground after the accident, that would furnish the most satisfactory proof that Leahy was not using it, as asserted. If it was there, and was removed, by whom and for what purpose, and in whose interest, was it returned?

The employés of defendant were first upon the ground after the accident. These men understand the purpose of a club and the dangers attending its use. It was in the interest of their employer, the defendant, that it should appear that Leahy came to his death from his own negligence in using this forbidden appliance. It is also in the interest of these co-employés that it should appear that this was the cause of his death, and not any carelessness or mismanagement of theirs in conducting the train. I can see no sufficient or plausible reason why any of these parties should have sought to conceal this club. Other parties upon the ground, not familiar with trains, and knowing nothing of clubs, would neither have understood the use nor appreciated the importance of this club as tending to explain the accident; and had this club been carried away by such a person, no reason is perceived why he should have thereafter returned it, or had he done so, why he should not have acted openly about it, and explained where it was found and the reason of its removal and return. Upon the other hand, it was, as already stated, the interest of the defendant to show that the club was employed. Some unscrupulous subordinate, either in the presumed interest of his employer or in his own vindication, might have placed the club where it was found. Be that as it may, the evidence renders it highly improbable that the club was where it was found for some hours after the accident. Whether that was owing to it having been removed and then replaced, or never having been there, is not known. It was in the interest of defendant that these proofs be made. It was in the interest of plaintiff that they should not. Those who were acting in the employ of the defendant were upon the ground with a full appreciation of the importance of this showing and abundant opportunity to fabricate it. No one interested for plaintiff, or shown to have any knowledge of this club or its importance in this inquiry, is shown to have been about the place of the accident for a long time thereafter. In my opinion these equivocal circumstances connected with this club must be charged to the case of the defendant, and I presume were so applied by the jury. It is, however, insisted that upon the whole case, and especially upon the capacity of the brake wheel, even though defective and impaired to resist any proper force applied to it, the evidence is so strongly with the defendant that the Court should set aside this verdict as contrary to the evidence. I do not understand that the Court disturbs verdicts upon this ground; for the reason that if it were trying the case it might come to a different conclusion from that found by the jury. This rule as to interference by the Court was very fully explained by me in Bland vs. S. P. R. R. Co. It was there stated substantially as follows: "The Court does not set aside the verdict of a jury because upon the same evidence as matters of fact it would reach an opposite conclusion; but that, making due allowance for the range within which fair-minded men and intelligent men may honestly differ, it is plainly apparent that this is not a verdict which any unprejudiced man ought to render or should have rendered."

The recent case of Nehrbras vs. Western Pacific R. R. Co. goes a very long way in support of this proposition of non-interference by the Court when there is substantial testimony to support the verdict.

The motion for a new trial is denied.

LAS ANIMAS.

MASSEY THOMAS vs. HENRY MILLER.

DECISION RENDERED IN MARCH, 1882.

This action is brought by plaintiff against a large number of defendants, for the partition of the "Rancho Las Animas." Of this rancho William T. Wallace has been for many years the owner of about seven hundred and fifty acres, and out of possession. Upon the 16th of August, 1881, Wallace sold and conveyed his interest in this rancho to Hastings, and at the same time assigned to said Hastings his claim for rents and profits heretofore received by the tenants in possession, from renters and others. Hastings is a party defendant in the partition suit, and in that action files a cross-complaint, in which he asks that an accounting be had with him by the other tenants, as well as the rents and profits received by Wallace, as also of those which accrued to Wallace before said sale. To this the defendants demur, and insist that, as to the rents accruing to Wallace before the sale to Hastings, these cannot be inquired into in this partition proceeding, and that the account can only be considered when it is the incident to an actual estate in the land. The question thus presented is novel, interesting and important. No decision directly in point has been presented, and with such light as the indirect determinations of our own Courts and the analogies supplied it by cognate branches of the law afford it will be considered. It is well settled that in a partition proceeding an accounting can be had between the tenants who were such when the account accrued (Goodenow vs. Ewer, 16 Cal., 461). And it is claimed that the case of Stuart vs. Throckmorton (not yet reported) will include the proposition here contended for by the defendant. That case is stated by counsel to be this: Stuart Throckmorton and another were tenants in common of a tract of land. Throckmorton was in exclusive possession, and received all the rents. Stuart and the other tenant united as plaintiffs in a suit to compel Throckmorton to account for these rents, and it is insisted that this right to thus unite was logically a determination that rents running to parties in different rights could be recovered by the assignee of such claims in a partition proceeding like the present. In my opinion there is no analogy between these cases. In the Throckmorton case the rights of all these parties related to one fund, and in which the parties' right accrued during one common period of time. These parties were not only each and all proper parties to this accounting, but were absolute necessary parties to it, and it would have been a misjoinder had any of them been omitted. A, B and C are tenants in common, owning an equal interest in a tract of land. A is in occupation to the extent of his own right, and B possesses the interest of C as well as his own, and is in receipt of rents thereon. Can C sue A and B for these rents without uniting A? It may be that B has made advances or incurred expenses for the common estate that will offset the rents received, and so demurs to the recovery sought by C, but C has a right to insist that such expenditure shall be borne ratably by A as well as himself—and A cannot be charged until he has had an opportunity to be heard. So also B may well object: "I have made advances for the common estate in excess of the rents I have received, and exceeding in value the interest of A as well as of C, and should not be required to suffer a recovery which will be in excess of the equitable lien which the law affords me." These, and many other reasons, may be suggested for the soundness of the ruling in Stuart vs. Throckmorton. That case, in my judgment, throws no light upon the question now in hand. The essential feature of an accounting is that there are between the parties undetermined, unadjusted accounts. The party concedes his ignorance of their real condition. It is for that reason he asks the aid of the Court. He need not ask for any particular sum or allege that any sum is due. That is the primary thing which the accounting he asks is to ascertain. When it shall be ascertained he asks judgment for the sum found to be his due. But the justice he invokes he also concedes. In his pleading he usually proffers that any amount found due from him may be given in judgment to his adversary, and this is the behest of the law whether or not proffered. How can this principle of mutuality be applied in the case at bar? Hastings may recover a judgment against Miller for the rents by the latter received before Hastings purchased—of the rents accruing while Wallace owned; but should it appear that Wallace was in arrears, that during his tenancy he had received more than his share and could be compelled to make restitution, how is it to be accomplished? Certainly not in this suit, for Wallace is not a party to it. Certainly not against Hastings, for he did not receive them—was not an owner when they were received. This purchase of Wallace's claim was not the assumption of Wallace's debt; so that Miller is called to account in a transaction in which he cannot obtain a reciprocal judgment against anyone. Nor would this rule be limited to partition suits. It might with equal propriety be extended to every form of co-partnership, and to all those relations in which, according to the practice of equity, an accounting may be required. Take the case of a mining partnership in which it is settled that the *delectus personæ* does not attach, but in which there may be a succession of transfers and of successive partners without dissolving the co-partnership. In such a mining enterprise A, B and C are partners. A, who is in arrears, and responsible, sells out his interest and transfers his account to D, who is irresponsible. Can it be that B and C must submit to an accounting of their transactions had with A with D, against whom they cannot recover a judgment, and could they, would find it worthless? And can each of the many who could thus assign their interests thus harass the remaining partners by such repeated and one-sided inquisitions? Nothing but confusion and injustice can follow from such a rule. Take the instance in which a partner's interest is seized under execution by a stranger. After a sale the Court orders an accounting, but this is had of the interest of the partner with the firm, and not at the suit of the intruder. The seizure, it is held, works an immediate dissolution; the preferred heirs of the partnership are first satisfied and the surplus is applied to the execution of the stranger. If any deficiency beyond the partnership interest is found against the attached partner, the members of the firm have judgment against him for such deficiency. No case is now recalled in which an accounting is asked of mutual transactions in which the party demanding the account was not in such a position that a judgment against himself might follow from an adverse adjudication. The right to an accounting is undoubtedly a personal one, the result, a judgment for money; the proceeds such as would pass to the executor and not to the heir, and as would not be transferred by the mere conveyance of lands out of which the right may have arisen when the personal status and relations of the parties are such as to permit it. This claim may be worked out in a suit, to which it then becomes the incident; when that relation does not so permit it must be regarded as a personal action. In a proceeding in which it is the principal thing in controversy, it may be conceded that embarrassments, multiplicity of suits and the like, must follow from this rule. These, annoying and vexatious as they are, still are not insuperable. Those difficulties which the opposite rule inaugurates and entails are insuperable, and cannot be permitted. To such of defendant's cross-complaint as calls for an account of the rents accruing before the 16th of August, 1881, the date of the sale from Wallace to Hastings, the demurrer is sustained.

GEINGRY CASE.

SENTENCE DELIVERED IN MAY, 1882.

The Court in this case, as in all other cases of this character, has not been content to avail itself simply of the plea as entered, but has availed itself of all sources of information. Some of the things are matters of common notoriety, some, perhaps, have come more particularly to the knowledge of the officers of the Court, and some, perhaps, are the speculations or surmises of the Court. You are charged with one of the gravest crimes known to the law; had it been consummated your life must have atoned for the act. This is not all. The facts show that this attack was upon a female, a defenceless woman. This is not all. This brutal and murderous attack was upon your orphan daughter, who had a right to look to you for protection and sympathy, not only for her personal safety, but from all scandal as well. This was not a single act, committed with a weapon of chance, such as you might lay hands upon in a moment of passion. It was with a pistol, the usual weapon of murder. You fired three times in your attempt to kill. I have endeavored, for the sake of humanity, to see if there be not some palliating circumstance in connection with your crime. I would have liked to have believed you insane. The investigations I have made do not reflect to your advantage. They reflect—but I do not care to repeat what may perhaps suggest itself to others, and what perhaps is suggested to your own mind. The only palliation that you have offered is that you were drunk, so drunk that you did not know what you were doing. I should be glad to believe that such was the case. It is something for humanity to believe that you did not commit the deed in your right mind. I will assume that you were drunk. I will give you the full benefit of the doubt. The judgment of the Court is that you be confined in San Quentin for a period of ten years.

A. W. PECK vs. MARY E. DONNER.

DECISION RENDERED JUNE, 1882.

A brief summary of the facts shows that in 1882 A. W. Peck, then suffering from a paralytic stroke and believing himself about to die, proposed making a will and leaving his estate, amounting to about $18,000, to Miss Mary E. Donner, the daughter of an old friend. That he was advised by the parties whom he consulted as to the will that a deed to Miss Donner of this property would be the preferable course, and, acting upon this suggestion, an absolute deed upon the consideration of love and affection was made by Peck. It was understood by Peck, by Miss Donner and by all who were concerned in the execution of this deed, that Peck was to continue in the control of the property and in the use and benefits of its rents and revenues while he should live; but no such reservation appeared in the deed, nor was any written agreement to that effect made.

After the execution of the deed, Peck's health somewhat improved. Upon learning that this instrument did take from him the control of the property he became dissatisfied, made demand of Miss Donner for a re-conveyance, and upon its being refused, commenced this action for a re-conveyance. About five months after the making of the deed Peck died, leaving a will, and thus action is continued in the name of his executor.

After examining these facts, the opinion proceeds as follows:

Before examining the legal questions in this case, I propose to briefly consider certain positions assumed by counsel upon the arguments, as much in justice to the parties and witnesses criticised as in the disposition of the asserted facts urged upon the consideration of the Court. It is insisted that Peck was importuned by the Donner family and their friends to make this disposition of his property; that Dr. Allen and Mr. Walker were parties to their efforts; and that the signature of Peck to the deed was in fact made by one of these parties holding and guiding Peck's incapable fingers. I find in the testimony and circumstances of the case no warrant for any such aspersions. The whole conduct of Peck shows that he required no such importuning. To his crippled brother and imbecile sister he gave no aid, while to this family he had given, within two or three years, in releasing the mortgage and building the house, nearly four thousand dollars. There certainly was nothing in his situation and surroundings to indicate any reason or purpose for suddenly changing the direction of his bounty. It does not appear even from his own testimony that there was the slightest solicitation or suggestion from any one as to who should be his donee. The only intimation seems to have been from Mr. Walker, and that was merely as to the form—the mode to be pursued—and that it should be by deed instead of by will. It is argued that the course pursued by Messrs. Clayton, Beach and Minor indicated some improper connivance upon their part in this transaction, but for this I find no warrant in the evidence. Beach repaired to Mrs. Donner's as a friend of Peck's. It was at Peck's request that he examined the deed, and he made no other suggestion than that a patent mistake as to description be corrected, which was done; and with the instrument thus corrected Peck expressed himself satisfied. That a new paper free from erasures and interlineations should have been thought advisable is the everyday experience and practice of every scrivener. What more Beach should have done than he did is not perceived. To have advised Peck, in the condition in which plaintiffs assert he then was, to revoke or recall this conveyance, or to interfere in any way with what, for aught Beach could have known, might have been the act of the soundest and most considerate judgment, might thereafter have well been called in question as a most unwarrantable interference, and the exercise of undue and most pernicious influence. In the counsels and conduct of Messrs. Clayton and Minor I see no single act inconsistent with their relations to their friend. He informed them sometimes that he had made a will, sometimes that he had made a deed, and again that he had executed neither, but at all times insisted that whatever he had done was only to be effective after his death, and that he was to have the rents of this property while he lived. These parties knew from him then, and for years had known, the disposition he proposed making of his property. They gave such advice as they deemed best adapted to secure the end. They made no effort to misinform or mislead—or even lull into silence—but they did advise that he consult a lawyer, and the one selected assuredly indicates no covert purpose upon their part. Mr. Clayton, upon a mere request from plaintiffs, produced all the correspondence of

Mr. Peck and of Mr. Allen with himself, letters which, if the representations of counsel when offering them in evidence were correct, were of the most significant and damaging character. I have considered with care all the testimony upon this point, and in it I see only the attempt of laymen to effectuate through legal forms the wishes of a feeble and infirm old man, and the after efforts of friends to secure him against the consequence of his own ill-adjudged and injudicious action. Although there is no evidence in this case that there was any undue influence, or influence at all, employed to induce Peck to make this deed, and although the change from the will as contemplated by himself to a deed as suggested by Walker was made as a mere suggestion and acceded to at once by Peck without either urging or solicitation; still it is insisted by counsel upon argument: "That as Peck was at this time in a very feeble and helpless condition—absolutely dependent upon the family of Mrs. Donner for all offices, from the least to the greatest: that this condition of dependence operated of itself as an undue influence," and should annul this deed. If this proposition be sound, it follows that while a party may give without question to those who neither aid nor befriend him, his gift is to be invalidated if gratitude for kindnesses rendered, or sufferings alleviated, shall inspire his action, and that in just the ratio in which he is needy and helpless is he incapacitated from recompensing those who, as "Good Samaritans," may minister to his necessities.

The statement of this proposition is to answer it. In my opinion there was no undue influence exercised over Peck by any one to induce him to make this deed; that he was at the time very feeble, both in body and mind; that he proposed to leave to Mary E. Donner, by will, this property; that to the suggestion that a deed to her would possess certain advantages, he consented. That he did understand that, this deed not being recorded, he would still retain the control of the property, and at all events, that his own declaration and those of all those parties by whom he was surrounded that he was to have the rents of the property during his life, secured them to him. Can such a conveyance, thus understood by the grantor as to its effect upon himself, be sustained against his better instructed objection? In no branch of the law is its beneficent and paternal character more apparent than where it interposes to protect the weak and the ignorant from the wiles of the crafty and the greed of the avaricious, endeavoring by just discrimination to so adjust its remedies that while upon the one hand there shall be no unwarrantable interference with the individual's right to control and to dispose of his own, upon the other he shall be secured from those spoliations which ever threaten the weak and the credulous. If it be a will—a testamentary disposition which it has to consider—it requires but a very limited degree of capacity to uphold the exercise of this power. In such cases there is no longer the interest of the grantor to be considered—only the wishes to be executed. That which he no longer requires he may bestow upon whom he will. If it be a contract that is involved, courts interfere with less reluctance. From the fact that values are exchanged, and that as to the relative advantages of such interchanges the best instructed may widely differ, the law in such cases interferes only when there has been apparent weakness upon the one hand, and that knowingly taken advantage of by palpable over-reaching upon the other. But in cases like the present, in which the transfer is a gift, taking effect in the life of the grantor, it questions the transaction without hesitation, and if it further appear that the donor was old and feeble—that his gift included so much of his possessions as to leave him impoverished—while it recognizes his right to thus strip himself even to mendicancy, yet a transaction so at variance with the dictates of prudence and the universal instincts of men it subjects to the strictest scrutiny, and compels its conformity to its most rigorous rules. To such a case the doctrine "that fraud must be proven and will not be presumed" has no application. That an act so injudicious and so ill-advised was not understood, is the presumption that attends it before the Court. And from this it must free itself if it would find judicial recognition. In such a litigation the parties are a grantee who has parted with nothing, and a grantor who has stripped himself of everything. To a transaction thus characterized, more than to the parties, the Court looks; and it will not suffer itself to be misled or embarrassed by substitutions or subterfuges.

Doubts and obscurities may be fatal to the transaction, they are not suffered to obstruct the Court. It requires from those benefiting by such an act to show that it is free from all objection and from every suspicion, and if these proofs be wanting, the gift itself fails. It is not, however, requisite that the grantor act with judgment. It is enough that he possess judgment with which to act Understanding he must appear to possess, though he may see fit to disregard its most obvious teachings. "It is necessary, however, that he comprehend not only the act, but also its direct and obvious effect upon himself, and that he fairly appreciate and knowingly accept these consequences."

From an act thus understandingly performed, Courts will not relieve—but the party must suffer the consequences of his folly and imprudence. Did this grantor thus understand and appreciate the nature of and the result of this his act? Was he advised that however prolonged his days or extreme his necessities the earnings of his lifetime—that which foresight might well look to, and ordinary prudence would retain—passed from his control forever, and that he was thereafter absolutely dependent upon this delicate girl for such assistance as gratitude might inspire or charity bestow? Did he know that upon the tenure of her life his maintenance must thereafter depend, and that her voluntary transfer of the property, or its enforced sale for obligations which she might create, might wrest it alike from her and from him? That it was upon the contingencies of her life, liable as it was to change, influenced as it might be by the counsels of others, or affected by caprice, that he was thereafter dependent? This was the situation in which this act assuredly placed him; and did this feeble old man, doubting "that he might live from one day to the next," thus realize his position? From every quarter all the witnesses concur that he not only did not intend this result, but that he mistakenly fancied he had provided against it.

That his declarations and the assurances of the others that he was to have the use and benefits of this property, its rents and revenues, was a reservation as effectual as was the deed which conveyed the property from him. That in this he was mistaken, that this assurance created no more than a moral obligation, not enforceable in law, and that it might be nullified by any of the contingencies above suggested, cannot be questioned; and such a mistake upon a proposition thus vital and important must bring this case within the rule cited: "That when the grantor in a deed of gift appears to have acted under a mistaken impression as to its effect—as to the consequences to himself or the position in which he was placed thereby—such conveyance will not thereafter, and against his objection, be upheld." It is insisted, however, that what occurred upon the visit of Beach to Sonoma County fully supplies whatever may have been wanting to validate this contract. All that there occurred was to correct the description and direct the deed to be given to Mary E. Donner; in short, to perfect the delivery to her. If Peck misunderstood the effect of this instrument before, what transpired in the presence of Beach could but have confirmed him in that mistake, for says Beach: "Peck said something to me about his having the use of this property for his lifetime, and this I also understood from all of them." Mr. Beach is not shown to have made any representation upon this point, and with this silent acquiescence upon his part Peck might well have supposed that all had been done that was required to secure to him this use. Upon the 24th of July, 1882, at the request of the friends of Mr. Peck, Mary E. Donner executed and acknowledged a special power of attorney to Peck. The instrument was prepared by Mr. Minor. It authorized Peck to take charge and absolute control of this property—to lease it and collect the rents upon such terms as he might see fit. To apply the rents, first, to such taxes and charges as might be imposed upon the property, to make all necessary repairs, and the balance to be received by him to his own use and benefit; and it further declared this power of attorney "to be irrevocable by me during the lifetime of the said A. W. Peck." For this power of attorney it is claimed:

First.—That this gives to Peck the interest in this property which he had supposed he was reserving when he made the deed.

Second.—That it operated as a ratification of the deed.

That the use of the term "irrevocable" does not make it so seems to be conceded, but for the defendant it is insisted that the transfer of the rents makes it a power coupled with an interest, and as such irrevocable.

The leading case upon this point is "Hunt vs. Rausmier, 8th Wheaton, 174." In this case, said Chief Justice Marshall, "a power coupled with an interest must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing, and not merely in the execution of the power." This definition is given in all the cases examined in which this question is involved. The sole purpose of this power was the leasing of the property and the control and disposition of the rents. The only interest of Peck was in the rents to be received and applied. I have no doubt this power was revocable at the pleasure of the maker. Further, the power did not restore Peck to the position he understood himself in when he made the deed. It charged him with maintaining these premises in repair from the rents he might receive. This, though a very reasonable duty, was one which, as owner, he could perform or disregard at pleasure. Further, this instrument limited him in the beneficial use of this property to the rents and revenues that might be received from it. Had these rents been wholly cut off by the destruction of the buildings or from any other cause, Peck under the power would have no right to mortgage the lot, either to replace the building or to maintain himself while the property remained unproductive. In my opinion, the use which Peck understood he was reserving was that of maintaining himself from this property while he should live. If to that end the mere revenues should suffice, these alone would be employed. If these were found inadequate, he did not suppose himself compelled to suffer in order to retain intact the principal. For many reasons this power of attorney did not restore Peck to the position he supposed he was occupying when he made the deed. Nor do I consider him estopped by it as a ratification of his improvident conveyance. His ignorance of the effect of this power of attorney—his apparent understanding that this instrument gave him the absolute control of this property and of its use for his lifetime—is as apparent as was his first opinion that he had reserved these to himself when he made the deed. Nor do I understand that even having accepted an agency will estop the agent in an independent proceeding, when disconnected from his agency—disputing the title or the rights of his principal upon either legal or equitable grounds. And although the maxim is, "That ignorance of the law excuses no one," there is a class of cases in which the party is held not to be estopped by acquiescence in a wrong while he is ignorant either of his rights or of his remedies. The extent of this rule, and its application to the facts of the case now in hand, I shall not further discuss. In my opinion this case is within the rule indicated. The first intimation to Peck that this deed might be set aside seems to have been made by Judge Payne after the power of attorney had been forwarded to Sonoma County for execution, and no further action as to this power of attorney seems to have been taken thereafter by Peck.

Without further extending this opinion, I determine that the deed of April 22nd, 1882, made by Peck to Mary E. Donner, was voidable as being a deed of gift made by a person feeble in both body and mind and without a proper understanding of its effect and consequences. That by none of the subsequent acts or proceedings of these parties was that infirmity cured or its effect obviated.

The plaintiff is entitled to the relief sought, that said deed be ordered cancelled and adjudged of no effect.

Let a decree be prepared and submitted accordingly.

CHAPTER XII.

PEOPLE vs. SMITH.

DECISION RENDERED AUGUST, 1882.

AN INFORMATION has been filed in this case by the District Attorney, charging the defendant Smith with the crime of libel. Upon the calling up of this information, the District Attorney moved that the case be dismissed for the reason that in his opinion the evidence was not such as would warrant a conviction. Upon this motion being made, J. C. Black, Esq., an attorney of this Court, requested to be heard. He stated that he was specially retained by some individual to assist in the prosecution of the case; that he had attended at the examination before the committing magistrate; and that in his opinion the evidence was sufficient to warrant and justify a conviction. That counsel thus specially employed shall be heard in opposition to such a motion may be well questioned. The District Attorney is made by statute the prosecuting officer of the county, and has the management and control of all criminal cases prosecuted within the county. For the faithful discharge of his duties he gives a bond, and for their efficient performance is accountable to his constituents. Involving, as this may, the life or liberty of the citizen, and entailing, as they always must, expenses upon the county, the duties of this official are always grave and important. It is not, however, in always pressing for convictions that these duties are most conscientiously discharged, and one very delicate and important duty of this officer is to determine when prosecutions shall be discontinued as no longer in the interests of justice. In determination of such questions the District Attorney must take a very large measure of individual responsibility. Although all are interested in the determination—the defendant, that he be not harassed with a causeless and unjust prosecution; the citizens of the county, that her revenues be not wasted in a wanton and fruitless litigation—it is in such cases that the instructed judgment of the District Attorney, subject as it always is to the supervision of the Court, must be of great weight. It is the expression of the will of the people through their specially selected official. That it be wisely and well given he must answer to his conscience and to his constituents. To permit the action or opinion of special counsel employed to prosecute, and not selected to judge, to override or overrule that of the county official cannot be tolerated. To permit it is in effect to subordinate the public official to the private employer and attorney, and to permit the latter to compel, in private and not in public interest, in gratification of personal resentment and not a public wrong, the expenditure of the county revenues. Farther, could this be permitted upon the motion of a private prosecutor, should this trial be ordered, the spectacle would be presented of the District Attorney conducting a trial and urging a conviction in which his avowed opinion was that no conviction could or should be had. The District Attorney should not place himself, he certainly should not be placed by another, in such a false position. At the urgent solicitation of the District Attorney, I have examined with care the testimony taken before the committing magistrate. It shows that the defendant, with others, was engaged in furnishing to merchants periodical statements as to the financial standing of their customers; that to these merchants books were supplied containing the names of citizens; that in one or more books so supplied appeared the name of R. O. Shively; that after this name followed the letter "D"; that in the back part of the book was found an index or key, in which this letter "D" was represented as "very bad"; that Mr. Shively becoming aware of the appearance of his name in this book, remonstrated with the defendant, and that thereafter the defendant made the following correction or change: "R. O. Shively reported June, 1880, went through bankruptcy to pay his debts, and now pays his debts." Four witnesses were examined for the prosecution, including Mr. Shively. Three of these explained the letter "D" coupled with the phrase "very bad" to be understood by them as meaning "poor pay," an undesirable customer on account of the difficulty of obtaining payment from him, and none of these gave to this publication any more objectionable import. Mr. Shively stated that he would understand it to mean "dead beat," "swindler," and "fraud." It was not shown that defendant or any other person had ever informed him as to the meaning of these expressions. He also admitted that he had been discharged in insolvency in this county within the last few years. It was further shown that these memoranda were furnished to the merchants at their request and as a matter of protection in their business, and it does not appear that the defendant was influenced by any feeling of malice or ill-will toward Shively in making any of these statements. I agree with the District Attorney, that upon a statement of this nature, made in the manner and for the purpose shown, no jury would or probably should convict of a criminal offence. If Mr. Shively has suffered injury from this action of the defendant, a civil proceeding affords him redress, and there he should seek it. The motion to dismiss is granted.

FRENCH vs. COUNTY.

DECISION RENDERED AUGUST, 1882.

The statute under which these fees are sought to be recovered reads as follows: "For all services and proceedings before a Justice of the Peace in a criminal case or proceeding, whether on examination or trial, three dollars." (Sec. 15,230 P. Code.) For this section but two constructions are possible. Either for *anything* the Justice may do in a criminal case he is to receive three dollars, or this is to be his compensation for *all* things that are to be done. I have no doubt the last is the proper construction, and the only one that will not lead to the most absurd results.

It was the manifest purpose of this section to not only fix the fees of the Justice, but to prescribe their limits. Sitting as a committing magistrate, the termination of the examination by which the defendant is held to answer or is discharged is the whole of that proceeding. So of the trial. This has been often defined, and is "the examination before a competent tribunal, according to the law of the land, of the facts or questions of law put in issue in a case for the purpose of determining such issue." (Anderson vs. Pennie, 32 Cal., 245.)

In the cases brought before plaintiff, this inquiry has been neither concluded nor even entered upon, and plaintiff is claiming the compensation at the inception of these proceedings which can only be allowed at their complete termination. This cannot be done. Could it, the plaintiff might as soon as these fees were paid resign his position, in which event he could do nothing more, and some other Justice would have to proceed with the cases, and that too without any compensation, unless it be admitted that the county can be made to pay six dollars when the statute says it shall pay but three. So, were any of these defendants to die before the trial, or were the law under which these prosecutions are had to be repealed, in either event the proceedings would abate, in the one instance as to the party dead, in the other as to all the defendants, and a question would arise as to whether fees could be collected in cases thus ended, and in which neither examination nor trial had been had. The rule here contended for, if sound, must be of general application, and Justices in all cases would be entitled to their fees upon the filing of a complaint before them. Such a practice would be at variance with all usages as to the compensation of officials for public services. Nor is there any occasion for thus anticipating the services which may never be performed. It is in the power as it is the duty of the magistrate to make a disposition of the cases brought before him, and while due consideration is had for the convenience of citizens and officials, he has the sole control of his own court, and can determine when causes shall be proceeded with or disposed of.

It may be suggested that this objection was not made upon the argument of this case. The point is presented by the denials of the answer and the fact was proven at the trial, and the bill presented to the Board of Supervisors is made a part of the complaint. The bill states in terms that these "cases are to be tried." The Supervisors are public officers; their duties are prescribed by law, and their powers must be exercised in strict conformity to the letter of the statute. They were not authorized to anticipate a compensation which might never be earned. The bill exhibited no legal claim against the county, nor does the complaint, based as it is upon this rejected bill, state a cause of action enforceable against the county. With such an obstacle at the very threshhold of this case, it is worse than useless to attempt an investigation beyond.

There are plain and speedy methods by which the question of plaintiff's jurisdiction may be determined. This is not one of those methods. The defendant is given judgment for costs.

ALBRIGHT DIVORCE CASE.

DECISION RENDERED JANUARY, 1883.

This action is brought by plaintiff to obtain from defendant a divorce upon the ground of adultery and also of extreme cruelty. The defendant answers and denies both these charges, and further alleges that if plaintiff's allegations are true, the plaintiff, with full knowledge of their commission, condoned and forgave the same. To this answer the plaintiff replies by her evidence, and, denying the condonation, further insists that if such former offences were by her forgiven, the defendant thereafter repeated his acts of adultery, and thereby forfeited the condonation, if any were had.

These are the issues presented by the pleadings in this case, and they will be considered in the order above stated. The evidence shows that plaintiff and defendant intermarried in the County of Santa Clara over fourteen years ago, and have since resided in said county; that there are now living the fruits of said marriage, four children, aged respectively fourteen, ten, five and three years; that the plaintiff is possessed in her own right of a considerable landed estate inherited from her late father, and consisting of over three hundred acres of valuable agricultural land; that in the year 1879 the defendant entered into an illicit connection with one "Mollie Parsons," a female of notoriously lewd and unchaste character, and that he exhibited this intimacy by acts of the most notorious and conspicuous character; that the fact of this illicit relation came to the knowledge of the plaintiff, causing her great distress and annoyance; that in the year 1881 the plaintiff consulted an attorney as to proceedings for a divorce upon the grounds of these adulterous acts of the defendant; but before an action was instituted the defendant persuaded the plaintiff to abandon said proceedings, and further induced her, upon his assurances of reform and promises that he would abandon his connection with this woman, and also that he would remain upon the farm of plaintiff and cultivate and improve the same, to make to him a conveyance of one-half of her separate estate. After the execution of this deed the defendant, in disregard of his promise to plaintiff, resumed his former relations with the woman Parsons.

Upon the 11th day of August, 1882, plaintiff commenced the present action, and soon thereafter, upon a proper showing made to this Court, an order was made commanding the defendant to refrain from visiting the plaintiff at her home, or from in any way interfering with or molesting her. The day after the procuring of this order, the plaintiff, accompanied by the defendant, called upon the Judge making said order, and represented to him that the order so made was uncalled for and not desired, and that she wished the same revoked, which, in compliance with her request, was then done; that a few days thereafter the plaintiff caused to be prepared, and herself signed and placed in the hands of an officer for service upon the defendant, a notice recalling this revocation and directing him to obey the order of the Court and not visit at her house; that a notice had been served upon the defendant by plaintiff's attorney, directing him to appear before a notary at a time named and give his deposition in this case; that the plaintiff herself, at the request of the defendant, signed a paper relieving the defendant from the requirement to appear and give said deposition, and he did not so appear.

Shortly after the commencement of this action Daves was employed to remain at the house of plaintiff in order to protect her from annoyance on the part of defendant, and also to prevent the removal by defendant of any of the personal property of plaintiff. Daves remained at the place for several weeks, and slept there during the night. While Daves was at the place the paper directing defendant to not visit the place was given him for service, and he was directed to search for and serve the same upon defendant. Other papers pertaining to the suit were at the same time placed by plaintiff's counsel in the hands of other officers for service upon defendant, and these officers visited the house of plaintiff in order to serve these papers. After this order was placed in the hands of Daves for service, and while the officers were so in search of the defendant, the plaintiff, fully aware of their object, assisted the defendant to evade and elude these parties; concealed him in the house for one day and night, herself preparing and taking to him his meals; and also, and during the same period, for some fourteen nights in succession, admitted the defendant to her bedroom, then occupied by herself, the defendant entering the room through the window, after dark, remaining there with plaintiff through the night, and retiring by the window at daylight in the morning; that she advised him to procure a lawyer and contest the case she was prosecuting against him, assuring him that with the advantages she was giving him he could not fail to defeat the action.

She made arrangements with defendant to borrow money upon their joint note to pay certain community debts, and also to settle the costs of this divorce suit, preparatory, it is asserted by defendant, to its dismissal. (This arrangement was not carried out.) And she was openly or clandestinely in almost daily communication with him. It is further asserted by defendant that during this period marital relations were fully resumed between himself and plaintiff—a proposition which plaintiff denies.

The surroundings of the plaintiff and her peculiar character and temperament afford the explanation to her singular and contradictory conduct. Naturally frail and delicate, she was now in feeble health, and her mental character corresponded in a large degree to her physical organization and condition. The defendant was the husband of her youth; her partner for fourteen years and the father of her children; and notwithstanding his flagrant derelictions she hoped, as only an affectionate and confiding wife can hope, for his reformation and reclamation.

Over her the defendant undoubtedly had very great influence. He was urgent in his protestations of affection and his promises of reform, and persistent in his entreaties for forgiveness. Night and day he was by her side, imploring her pardon and promising future fidelity. Upon the other hand her brothers and other relatives, bound by no such ties to defendant, and better able to estimate the value of his protestations and promises, were equally urgent that she should now and forever free herself from a relation which reflected but shame upon herself and children, and threatened her with financial ruin besides.

In the presence of her relatives she could not answer their reasonings or question the soundness of their counsels. While with the defendant, the affection of the wife overcame the remonstrances of her strong-willed relatives. It was reason and conviction that pointed in one direction; it was blind affection, misguided by hope, that led in another. Feeble and irresolute, wha wonder that, thus constrained, she tottered on in these devious paths? With her character understood and her surroundings estimated, her situation was most pitiable.

Is the act of condonation, the fact that she forgave or resolved on forgiveness, qualified or neutralized by these considerations? In my opinion it is not.

Marriage, in its inception, is not always the exercise of the most profound wisdom or the most obvious sagacity. Sentimental considerations, which each must estimate for himself, are made controlling premises, and prodigality of promise with paucity of performance quite often characterizes these contracts. As in their formation, so in their restoration when disturbed or broken, the injured party must judge for himself the value of those considerations which move to forgiveness. Affection not wholly alienated, the future of children, social position, with perhaps the thought that she may not have been at all times herself wholly blameless—these are the weights in the scale which is given to her hand alone, and which she values as she will. To her alone is it given to decide, and that decision is final; and though all may criticise, none may reverse, her judgment. Nor is it essential that this forgiveness be expressed in formal words or evidenced by any special ceremonial. It is sufficient if it appear that the wronged party has resolved to renew or resume those marital relations which it is her right to treat as ended; that it is manifest she proposes to continue with him as his wife. It is in this resumption of the marital relations that the most frequent as well as satisfactory proofs are found. In this form of forgiveness the self-pride of neither is wounded, while its public manifestation is proof more satisfactory and conclusive than any formal declaration could possibly be. Nor is this forgiveness, once bestowed, in any way qualified by the fact that the party wronged may vacillate in her purpose, and that the condonation of one day may be regretted upon the next. Once granted, it is beyond control. The recipient may, indeed, by renewed transgressions, forfeit this concession, but once bestowed, it cannot be withdrawn.

A review of the testimony upon this subject would be neither pleasant nor profitable, while much of it is of a character which, while it may not well be repeated, has been carefully estimated. From many directions, and upon independent considerations, the testimony all tends to the one conclusion that there was a forgiveness. In the very shamelessness of the defendant's offending I find a cogent argument for the condonation asserted; for how could a woman thus grossly, thus foully wronged, consent to the after association and the many interviews here proven had she not resolved upon forgiveness?

In my opinion, the plaintiff did, between the 11th of August, 1882, and the 11th of September following, fully condone and forgive the defendant his former adulteries with the woman Parsons; and that she but waited the time when her own self-pride would permit her to make this fact known, and to meet those reproaches from relatives and friends which she was sure to receive.

Was this condonation forfeited by any renewal of defendant's misconduct? Says the Code of this State: "Condonation is revoked and the original cause of divorce renewed: first, when the condonee commits acts constituting a like or other cause of divorce." This section but repeats the rule of the Ecclesiastical Courts of England and of the Courts of this and most of our sister States.

It is not pretended that any act of condonation or forgiveness occurred after the 11th of September, 1882. Is there any evidence of misconduct by defendant subsequent to that date? The testimony upon that branch of the case is so significant and important that I present a summary of it as given:

The defendant, Albright, was examined as a witness upon his own behalf, and at very great length. He was only questioned as to those matters which tended to establish condonation, and his own conduct thereafter. He testified that for some time prior to August 11th, 1882, this suit was in contemplation and the papers were in course of preparation by attorneys; that during this time he was endeavoring to effect a reconciliation with plaintiff; that upon that day, August 11th, 1882, she informed him that the suit was to proceed, and that he would be at once served with process; that upon the following day (Saturday), August 12th, he drove to the house of Mrs. Parsons, in San Jose, informed her of the suit being commenced, obtained from her some valuable papers—securities for money owing to him—placed in her charge two valuable horses, and directed her to at once take these horses and a bill of sale made of them to her brother, David Wilmoth, a resident of Monterey County; that he took this course to prevent the seizure of this property by orders of any kind that might issue in the suit being brought against him; that he himself proceeded to Oakland and San Francisco and disposed of the securities referred to; that upon his return to San Jose, Sunday, August 13th, he found in the post-office a letter from Mollie Parsons to himself. In it she said she had got all she wanted out of him and that he could whistle for his horses or his money; that he went to his wife, informed her of what he had done with the horses and the note he had received from Mrs. Parsons; that his wife advised him to sue for the horses, and said she would render him all the assistance she could to regain the property; that on the following Monday he met Mrs. Parsons at the Eighteen-Mile House; that the meeting was accidental and unfriendly, and that she informed him that these horses were beyond his reach; that a day or two before he had met her for a few minutes at Mr. Gill's office, and that this meeting was unfriendly; that these were the only occasions on which he had met her after the 11th of August, and that their relations had been all this time unfriendly, and had so continued. Further questioned, upon cross-examination, the defendant admitted that about the 9th of September, 1882, he went to the house of Wilmoth, in Monterey County, for the purpose of collecting the pay for the two horses; that he met Wilmoth near the barn; that after some negotiation he received from Wilmoth $450, the price of one of the horses, and the other horse was returned to him; that he did not go into Wilmoth's house, and did not see Mollie Parsons at that house; that with the money and horse he started on his return to Santa Clara County; that on his way he was intercepted by Mollie Parsons with a horse and buggy; that she informed him that he could not take that horse out of Monterey County, used to him vile and abusive language, and endeavored to interfere with his progress by driving before him and across the road; that after pursuing this course of speech and of action for a mile or more she left him, and he continued on his way toward San Juan; that in the Gabilan mountain night overtook him, and doubting his ability to make his way in the night across the mountain he halted at the camp of some hunters; that he fed his horse from hay found near by and the hunters shared their meal and their blankets with him, and that he remained at this camp that night; that the next morning he resumed his journey and returned to Santa Clara County by the way of San Juan; that he was at no time with Mollie Parsons in any house in Monterey County, that he had no other interview with her in that county than that above detailed, and that his relations were most unfriendly.

This statement of defendant as to his journeyings in Monterey County was iterated and reiterated by defendant, both in answer to questions of plaintiff's attorney and of his own, with a minuteness of detail and a circumstantiality of incident which renders any unintentional mistake or misapprehension impossible. After the defendant had testified as above stated, plaintiff examined as witnesses F. M. Hopkins, Daniel McCall and D. S. Beckwith. These parties testified that in the month of September, 1882, they were employed upon the place of one Worthy Parsons on the Gabilan Ranch, Monterey County; that at that place frequently visited a woman calling herself Mrs. Mollie Albright and the sister of Worthy Parsons. By a photograph shown these witnesses, they recognized this woman as the Mollie Parsons referred to in this case; that in this family she was spoken of and referred to as the wife of Harry Albright of San Jose; that upon the 9th of September, 1882, the defendant Albright came to this place with a horse and buggy; that Mollie Parsons was there; that the intercourse between the defendant and Mollie Parsons was amiable and affectionate, such as might be expected between husband and wife; that they were together called to supper by Mrs. Worthy Parsons, and to all appearances took supper together with the other members of the family; that the horse of defendant remained at the stable of Mr. Parsons that night; that at an early hour on the following morning defendant was in the stable cleaning, feeding and watering his own horse, and that defendant also groomed and fed the horse of Mrs. Mollie Parsons, kept in the same stable; that while he was so engaged Mrs. Mollie Parsons was with him, and that when called to breakfast defendant and Mollie Parsons went into the house together; that after breakfast the defendant and Mrs. Worthy Parsons drove away from the place in one buggy, and Worthy Parsons with Mrs. Mollie Parsons in another buggy went in the same direction; that these parties—defendant and Mollie—were in frequent intercourse while at the place, and that their conversation and deportment toward each other was of a most friendly and affectionate character, and such as might have been looked for between husband and wife.

The defendant made no effort to contradict these witnesses, nor did he make any attempt to explain any of the very apparent discrepancies between their testimony and his own.

The effect of this contradiction upon defendant's credibility as a witness cannot well be over-estimated, and it may be stated that the conclusions in this case, heretofore indicated, have received no aid from the testimony of the defendant. The effect of this evidence, however, goes much further than the mere contradiction of defendant as a witness. It exhibits the defendant, after the condonation relied on, again consorting with his former paramour under circumstances which admit of but one inference: that there was a renewal of his former illicit relations with her. If upon such circumstances a Court could hesitate, the evidence pointed out by the great luminaries of the law must remove all possible doubt.

Said Lord Stowell: "Adultery is peculiarly a crime of darkness and secrecy; parties are rarely surprised in it, and so it not only is, but must be, established by circumstantial evidence." Cited: Bishop's Marriage and Divorce, 2d Vol., p. 613. And again he says: "Courts of justice must not be duped; they will judge of facts as other men of discernment, exercising a sound and sober judgment on circumstances that are duly proved, judge of them." (Ibid, 614.) And Chief Justice Shaw, speaking for the Supreme Court of Massachusetts, repeating with approbation and emphasis this language of Lord Stowell, adds: "And if it were shown that the mind and heart were already depraved, and nothing remained wanting but an opportunity to consummate the guilty purpose, then proof that such opportunity had occurred would lead to the satisfactory conclusion that the act had been committed." (Ibid, 616.) And again: "If the opportunity and the will remain, the offence is committed, and where both are established, guilt will be inferred." (Ibid, 619.) "And as a general proposition, when adultery between two persons is proved to have taken place, less evidence will suffice to establish a continuation of it than would be necessary to establish the first offence." (Ibid, 635.)

These are rules, axioms of the law, which, though repeated and applied in numberless decisions, do not require judicial assertion for their universal recognition. The frailties and imperfections of human nature, the appetites and the passions of men, underlie most of the controversies of life—and he must be but an inefficient umpire of motives and purposes who cannot estimate at its proper weight the potential factor involved in the present controversy. It is but ordinary discernment which recognizes the purpose that took the defendant to Monterey County, and the reasons for the falsehood by which that visit was sought to be cancelled.

If we invoke the rules of the cases above cited; if we inquire, were these parties willing to renew their former relations—that former and shameless intimacy—the pre-concert which brought them again together at this secluded place, their deportment towards each other, permits but one answer—was opportunity afforded? The family in which this woman could be received as the defendant's wife, and he could be welcomed as her husband, would offer no serious obstacle to any intimacy desired. The two conditions from which, say the Courts, adultery will be conclusively presumed, could not be more clearly established. It is true there are instances recorded in both sacred and profane history in which circumstances, perhaps as equivocal, have been found compatible with innocence, but such instances are exceptional and have always been so regarded. They are arrayed against the experience of many and the observation of all. It is by the general rule and not by extraordinary exceptions Courts are to be guided, and I see no reason for adding the defendant to this very limited list of recognized exceptions. I have no doubt the adulterous relations of the defendant with Mollie Parsons were renewed at this visit to Monterey County. It may be insisted, however, that as these later acts were after the filing of the answer in this case, they cannot be considered in this action. This question was not argued by counsel, and will be examined in the light of such researches as I have been able to make. The Code of Civil Procedure of this State, in Section 422, provides what pleadings shall be allowed on the part of plaintiff. First, "the complaint"; second, "the demurrer to the answer"; and on the part of the defendant, first, "the demurrer to the complaint"; second, "the answer." It further provides that the answer may contain "a statement of any new matter in avoidance, or constituting a defence or counter-claim." (Sec. 437, C. C. P.) Section 462 provides: "Every material allegation of the complaint not controverted by the answer must, for the purposes of the action, be taken as true—the statement of any new matter in the answer in avoidance, or constituting a defence or counter-claim, must on the trial be deemed controvertance of the opposite party." It is further provided that the "plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer." (Ibid, Sec. 464.) These are the only sections of the Code which seem to have any special bearing upon the question now considered. Under these provisions, and in a system in which rebuttals and rejoinders are not permitted, it is not readily perceived where this "revocation of the condonation," or "reviver" of the original cause of divorce, as it is termed, would find place as a pleading; to give it such place is to introduce a pleading prohibited by the Statute, and to adopt a system which the Code seems most sedulously to oppose. Assuming, however, that as a fact pleaded or proven it is admissible, to what does this subsequent transgression apply? Manifestly not to the original offence; that can neither be aided nor affected by it. Habitual intemperance, as a condoned delinquency, may be revived by subsequent adultery, or by cruelty, though no amount of evidence as to the latter could possibly establish the former. The new offence acts upon the forgiveness and upon that alone, and leaves the original wrong to stand or fall upon its own demerits, and had all these matters transpired before issue joined, this last fact of "reviver" would not have required any formal pleading for its assertion. In the present case the condonation relied on followed the commencement of the action, and the subsequent adultery was nearly a month after the filing of the answer. Does this fact prevent the Court giving effect to these subsequent acts? It may be stated that as a rule pleadings in a divorce suit are not construed with the same strictness as in other cases. (Second Bishop, 345.) And says the same author:

"A maxim in these suits, therefore, is that a cause is never concluded as against the Judge; and the Court may, and to satisfy its conscience sometimes does, of its own motion, go into inquiry of matters not involved in the pleadings." (Ibid, 253.) So again, of matters of defence "transpiring while a suit is pending, this may be brought to the attention of the Court by a plea *puis damin* continuance." It may be stated of some of the rules above cited that they are given to guard the Courts, and through them the public, from consequences of collusion and consonance, but they also indicate a very liberal rule both as to pleadings and proofs in this class of cases. In the present case, had a pleading been requisite to those proofs of subsequent adultery, there can be no doubt that under these cases and Section 464, before cited, the Court would have been abundantly justified in permitting such pleadings to have been then filed. Independent, however, of this consideration, it is well settled in this State that if a proposition of fact be litigated at the trial as an issuable fact, it will thereafter be permitted a party to rely upon any insufficiency as to its averment, whether in the allegations of a complaint or the denials of an answer. This rule is a most just and salutary one. It apprises the party proceeding upon an imperfect pleading of that fact, while the remedy which may be afforded by amendment, in other form, is yet attainable, and estops a party from thereafter objecting to evidence, or to its effect, which he has admitted unchallenged at the trial. Was this case thus tried? The defendant, "Albright," was questioned by his counsel upon his examination-in-chief as to matters pertaining to the condonation, and no further. This embraced the period from the 10th of August to the 4th of September, the day of the filing of the answer. Upon cross-examination he was questioned as to his interviews with Mollie Parsons after the 4th of September and throughout that month. No particular question was asked by plaintiff's counsel as to whether the relations between himself and this woman were friendly during this period, but the acts indicated hostility. Upon re-examination by his own counsel, defendant stated in terms that from the date of a meeting with her in Mr. Gill's office she had been unfriendly with him and had so continued. This testimony was introduced without objection upon the other side, and if credited would have justified the Court in finding that there was no renewal of the offence condoned. If there were any doubt as to the light in which this evidence was then regarded by both sides, it must be dispelled by the introduction of the witnesses from the place of Worthy Parsons. Those all testified to matters occurring upon the 9th of September. Their testimony not only contradicted the defendant but established a new and most material fact in the case. Their testimony was admitted without objection, and the two first were cross-examined by defendant's counsel. If it be said that this evidence was admissible as contradicting the statement of defendant as to his conduct in Monterey County after the 4th of September, the answer is that if defendant's examination upon those matters was to an immaterial matter, permissible as affecting his credibility, the party eliciting such testimony is concluded by it and cannot controvert this immaterial matter by further evidence. In no aspect of the case was the testimony of these witnesses admissible, except that it related to material issues then in controversy, and had objection been made, it would leave the right of the party to move for leave to so amend as to obviate this objection. It was treated by both parties—by the one by the offer, and by the other by tacit acquiescence—as a material fact properly triable; it is too late to now object that it was. Further, there is no lack of authorities to the point that a fact which might have been litigated in a controversy, and which was in fact thus drawn into inquiry, is conclusively adjudicated by the determination in which it was thus brought in question. Were this evidence to be now disregarded, and this rule to be hereafter applied, the plaintiff might, after being denied the benefits of this evidence in the present case, find herself estopped from asserting it in any subsequent controversy. The evidence which the defendant admitted without objection, which he did not exclude when he should, or controvert when he perhaps could, will be estimated for what it was apparently offered and understood to establish. That evidence and its effect have been already considered. It cancels the plaintiff's forgiveness and revives the defendant's original offence, and entitles the plaintiff to the relief sought in her bill.

Let a decree be prepared and submitted accordingly.

LAS ANIMAS.

HENRY MILLER ET AL VS. MASSEY THOMAS ET AL.

DECISION RENDERED JANUARY, 1883.

This action, brought to procure the partition of the Las Animas Rancho, was commenced in the former District Court of this county in the spring of 1879. The magnitude of the property, the extraordinary number of defendants (several hundred being made parties), the fact that one of the principal towns of the county is located upon the premises to be partitioned, are matters which would of themselves present a case of no ordinary difficulty. In addition to these embarrassments, inseparable from this class of cases, other and intermediate obstacles have been presented, compelling delays which it was alike beyond the power of the Court or of the parties most interested in procuring this partition to avoid; and now, with many of these difficulties removed or obviated, after these years of delay, an objection is presented, raised by parties who have appeared in the case and who are anxious for a speedy determination of this controversy, which, if well taken, must adjudge all that has been accomplished in the past as of naught, or all that may be attempted in the future as fruitless and futile. It is now objected, that the order of this Court made upon the 7th day of July, 1879, directed to several hundred absent defendants, was based upon an affidavit insufficient and worthless; that for this reason that order was wholly unauthorized and void; and that, based upon this as a service, any judgment which may be pronounced as to the interests of these absent defendants will be ineffectual and void. This is the proposition now presented and insisted upon by litigants who are anxious for a speedy disposition of the controversy, but who are willing to bear the annoyance and the hazard of further delay and the expense of renewed proceedings rather than that which they regard as a fatal defect shall be suffered to remain and impair the efficacy of the judgment in which they are so deeply interested. Upon the other hand, and by about an equal representation in this property, it is insisted that the affidavit in question is ample and sufficient; that the judgment to be based upon it will be beyond any successful attack or question; that to further postpone this case upon a strained or doubtful construction is to assure delays and greatly increased expenses, with the probability that further and now unforeseen obstacles may present themselves before this case can again progress to its present status. From any determination the Court may make, consequences of a very grave and serious nature may follow. If it shall adjudge this process insufficient, these proceedings are substantially remitted to their position of five years ago, with all the further delay, expense and vexation that have already characterized them. If, upon the other hand, the Court shall hold the process valid, and in this shall err, the whole of this proceeding may be hereafter invalidated by the action of any of this host of absent defendants.

With this the position of these parties, and this the consequences of its action, a Court may well feel a more than ordinary solicitude that that action upon its part which is to be followed by such important and far-reaching results shall be free from any error which caution can detect or care can eliminate. It is with a full appreciation of the gravity of this question that I approach its consideration. The service of process by means of publication is found in the systems of but few of the States, and as judicial inquiry as to the sufficiency of such process would, from the very nature of the question, be usually finally disposed of in the courts of first instance, the reported adjudications upon this subject are singularly few and meagre. There are two sections of our Code of Civil Procedure which may apply to this question—Section 412, found in the general regulations as to practice; and Section 757, of the Act relating to partitions. The latter is as follows:—

"If a party having a share or interest is unknown, or any one of the known parties reside out of the State or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served by publication." (Sec. 757, C. C. P.)

Section 412 is unlike this in its verbiage, as also in certain requirements. I am of opinion, however, that as to the question here presented, the requirements of the two sections are substantially the same, and shall so consider them. These provisions are understood to have been taken from the Codes of the State of New York. It is a familiar rule of construction that the adoption of the statute of another State adopts, with the legislation, the judicial interpretation which such statute may at the time have received in the State in which it was created. In view of this rule, the decisions of the State of New York upon these provisions of the Code can be considered hardly inferior as authority to those of our own State, and will be so estimated. From such examination of these adjudications as I have been able to make, the following general principles may be deduced: That as this mode of acquiring jurisdiction is statutory and special, the notice following upon it being presumed by mere construction of law, and not as the result of any actual communication, strict compliance with every requirement of the statute will be demanded. That the proceeding by which an order for publication is obtained is strictly judicial, complete and conclusive in itself; its basis, an action pending, and a necessary or proper party thereto absent or not to be found by the exercise of due diligence. An affidavit by which these as facts are to be clearly shown, the mode of proof, and the order of the Court, in fact and effect, a final determination that the matters which the affidavit tends to establish are, in fact, proved and established, and by the order that, upon this as a finding of fact, the publication be made. That such affidavit, if it state mere conclusions of law, or set forth such ultimate facts as it is the province of the Court to find—but it must state probative facts—must make such a statement of the efforts put forth and employed as might be given in testimony upon a trial, or received from the lips of a witness examined as to these matters before a Court. That if the affidavit be wholly silent as to any fact required to be shown, or if the matter be set forth as ultimate and not probative facts, or as a legal conclusion merely, the Court will not acquire jurisdiction to make the order of publication, and all proceedings dependent upon such order for their validity will be void, and so held, whether called in question in the immediate proceeding or attacked collaterally in an independent action. If, however, there is some proper evidence presented by the affidavit tending to establish every essential fact, although such evidence be meagre and imperfect, yet in order, based upon such showing, it can only be assailed in the direct proceeding by those then objecting to the sufficiency of the evidence to support the conclusion upon which the order for publication is based, but such order cannot be called in question or successfully assailed in a collateral proceeding. These are general principles determined in and supported by most of the cases I have examined, and opposed by none. The leading cases upon this subject are: Ricketson vs. Richardson, 26 Cal., 150; Forbes vs. Hyde, 31 Cal., 351; Braly vs. Seaman, 30 Cal., 610; Skendon vs. Kelly, 18 N.Y., 355; VanWick vs. Handy, 39 Howard, 392; Morrow vs. Reed, 4 Iowa, 77; Freeman on Judgments, section 522. With this statement of the general principles governing this mode of procedure, I now propose presenting, with my own order of arrangement, the matters appearing in the voluminous affidavit through which it is claimed that jurisdiction was acquired. It is made by A. G. Hinman, and recites "that he is a white male citizen of the United States, and over twenty-one years of age, and competent as a witness; that he was for many years a Deputy Sheriff of Santa Clara County; that about the 15th day of January, 1879, he was employed by plaintiffs to serve the summons in the action on all the defendants that could be found in this State, that he immediately entered upon these duties under this employment, and travelled throughout the State for the purpose of serving all the defendants in this action that could, with the exercise of due diligence, be found within this State, and to ascertain the whereabouts of such of the defendants as had left the State, or were not in this State; that he made diligent inquiry in different parts of the State for the several defendants whose residences were unknown to him. And this deponent sought information as to the abode and whereabouts of all of said defendants from every source likely to afford him the desired information. That after making careful inquiry of all persons likely to know, and seeking information from all sources likely to afford it, he has been unable to ascertain where either of the following named defendants reside or now are, namely (stating 250 names). Deponent further says that he has made diligent inquiry in different parts of the State to ascertain where the above named defendants could be found, and that he has made diligent search and inquiry for all and each of said above named defendants in every place and from every source likely to afford information as to the abode and residence of said defendants, and has exhausted all the means within his power to ascertain whether any of said defendants could be found within this State, and also to ascertain their residence and place of abode out of the State, and also whether any or either of them had departed from the State, and if so, when and for what place, and that after making such diligent inquiry and search, deponent has been unable to find either of said defendants in this affidavit above named within this State, or to ascertain the abode or place of residence of either of said defendants, and he has been unable to ascertain whether either of them had at any time departed from this State. And deponent further says that he was solely occupied in making such inquiry as aforesaid and serving said summons for at least one hundred and twenty days. And deponent says that said above named defendants or any of them cannot, after due diligence, be found within this State." Upon this as evidence the Court found as a fact that these parties could not after due diligence be found in this State, and thereupon made the order for publication. Are these matters as above set forth conclusions of law or matters of fact? If facts, are they ultimate or probative facts, and are they of suchforce and significance as to justify the Court in the ultimate fact by it found, and the legal conclusion stated in its order?

In Green vs. Palmer, 15 Cal., 412, the question as to what were ultimate and what were probative facts as related to pleadings was stated with the utmost precision, and the frequency and fidelity with which this decision has been followed has given to the views there expressed and the definitions there stated all the force of a statuory declaration. As defined in this and following decisions, an ultimate fact is that upon which an issue may be joined which must be traversed, or it stands admitted, and not to be controverted by proof, which must be found by the Court as the final result of proofs. Such is the fact which the pleader must state, and not the evidentiary matters by which it is to be established upon a trial. All else material to such inquiry and tending to establish such ultimate fact is evidentiary or probative—not to be alleged in a pleading, or found by the Court, but is the showing required in an affidavit which is to present probative facts and these only—evidence from which the Court must find the ultimate fact and deduce the proper legal conclusion.

Apply these tests to the matters shown by this affidavit as above recited. Concede that the last paragraph, "cannot after due diligence be found within the State," is a compound proposition of legal conclusion and ultimate fact, not properly in this affidavit, and what remains? That a person familiar from former experience with duties of this character was engaged over one hundred and twenty days in search of these defendants; that he made diligent inquiries in different parts of the State, and careful inquiries of all persons likely to know of them, and sought information from all sources likely to afford it; that he has exhausted all the means within his power to find these parties, and that after such diligent inquiry and search he was unable to find them in this State. Whatever else may or may not be shown by this affidavit, the foregoing as statements, unqualified or restricted, are there set forth. Tested by the legal rules I have formulated, these are, in my judgment, probative facts. Not one of the foregoing propositions but would have been stricken from a pleading upon motion as being a mere recital of evidence; not one of them, relied upon as a finding, would have supported a judgment in which it was an issuable fact. It is the ultimate fact that these parties cannot be found in this State. It is evidence tending to establish that fact that one man or a number of men searching for them cannot find them here, and this the affidavit states in terms. It is a probative fact that a witness looks for a person, inquires for him, makes search to find him—physical acts are certainly facts by every rule of common intendment or of legal or grammatical construction, and these are stated as the acts—as the efforts—of this party to the end in view. To repeat, the matters I have recited are relevant and material, and of a character which would entitle them in some form to expression in this proceeding.

Conclusions of law they are not, for the Court would not undertake to recite as a judgment that a party had traveled, had searched, had inquired, was unable to find: ultimate facts they are not, for they could not remain in a pleading against objection, nor could they stand as a finding for any purpose; evidence they must be, probative facts they must be, and these they are. The fact that the affiant might have gone more into detail, might have stated where he traveled, what were the inquiries he made, the circumstances of his search, does not affect the quality of this as evidence, nor impair its efficiency. Further particularity might have strengthened or impaired this statement, as might the cross-examination of a witness to the same matters in open Court; but would the finding of a Court made in an ordinary trial, that with reasonable exertion a party could not be found within this State, made upon such testimony given by a witness with nothing gainsaying it, be set aside as not supported by the evidence?

I think that there can be but one answer—that it would not. Again, if the affiant must set forth in detail the circumstances of his effort, where is his recital to stop? Why must he not name every place visited, every person questioned, every question asked? In short, in this retrograde sequence where does the Court pause in considering what it must determine, while the witness proceeds with that which he must exhibit? To have required the affiant to repeat in detail all his inquiries, efforts and exertions, occupying over one hundred and twenty days, and concerning two hundred and fifty defendants, would have been interminable in itself; would have embarrassed without instructing or enlightening the Court; and would have appeared more like an effort to seem diligent, and prepare a mass of formal proofs, than like an honest effort to the single end of finding these parties. I am satisfied that this affidavit does present evidence of the proper quality tending to establish the conclusion of the Court.

Is it sufficient in force, weight and legal effect to establish the propositions to which it tends? Due diligence means only that reasonable effort which the law requires in view of the ends to be accomplished, and the means available. It does not mean that every effort possible should be made nor that extraordinary exertions shall be shown. What it exacts is a reasonable attempt to accomplish the purpose desired. An earnest effort, with such means and in such modes, and continued to such an extent as would characterize the effort of a person of ordinary vigilance, prudence and care to accomplish such a purpose—thus far he must go, and thus far he must show he has gone, but he need go no further. I am satisfied that the facts before recited do make this the case, and do show this measure of diligence. Instances may be readily supposed in which it would be virtually impossible to make or attempt anything further.

Take the instance of a grantee named in a recorded deed, who has never been in this State or even upon this continent. What course would be taken in such a case? What facts could be shown to the Court to establish the reasonable effort which constitutes due diligence other than those here shown? This, it is more than probable, is the actual fact as to many of these absent defendants, and may well be as to all of them. It was further suggested, upon the discussion of the question, that as the affiant set forth that he "was engaged for one hundred and twenty days in this search," that as to those inquired for at the commencement of this term, the interval between the search and the affidavit was too long to justify the Court in assuming that they might not then be found. Affiant states that he was all this time searching for all the parties; a much more reasonable course than to assume that any special time was set apart in searching for particular individuals.

Without extending this opinion further, and in conclusion, I am confident that the order for publication will successfully resist any collateral attack—the only form in which it can be assailed by these absent defendants. I am further of opinion that it would be upheld against a direct assault by the parties who now question it. Were my views upon these propositions less assured than they really are, I should still be disposed, if possible, to sustain this process. In the further progress of this case, and with but little delay or additional cost, an interlocutory decree will be reached and other questions are quite likely to be presented which may induce an appeal to the Supreme Court. Upon such appeal this question may be presented and receive such authoritative determination as will place it, in this case at least, for ever at rest.

Further than this, the consideration of the very large number of citizens concerned in this controversy, the almost public nature of the interest involved, might well induce the Supreme Court to advance this cause for a speedy hearing. Could this be done, a final adjudication in the Court of last resort might be reached in less time, and with far less of labor and expense, than were an attempt now made by recommencing these proceedings to correct this assumed error. This question is not now presented by any formal objection or exception, but as an amicable *quære* calling for an expression from the Court.

I am of opinion that the process in question is valid and the procedure regular and sufficient, and the cause will be proceeded with accordingly.

SENTENCE OF JEWELL, MAJORS AND SHOWERS FOR MURDER.

DELIVERED IN JUNE, 1883.

The verdict of the jury in this case would abundantly justify the Court in pronouncing the extreme penalty of the law without further argument or remark, but in my opinion the penalty of death should never be inflicted unless the Judge as well as the jury be entirely satisfied that no other punishment is compatible with justice. In the present case the story of this crime has been four times told in my presence; three times by your confederate and once by yourself. That story thus narrated is simply this:

That for two weeks prior to the 11th day of March, 1883, yourself and your associates were planning and plotting how you could best rob Wm. P. Renowden; that upon the night of the 10th you repaired to the vicinity of his house, concealed yourself there that night and the next day; yourself and Showers watched from a covert in the vicinity the movement of your purposed victim and you found that there were two men there. Every movement was watched during the day, and at night, under the pretext that you required their hospitality or guidance, you went to the house of Renowden; in response to your request he tendered you the assistance demanded, and you immediately assaulted him for the purpose of consummating this robbery.

The old man resisted as he best could. He could but prove his courage, he could not preserve his life. Surprised, unprepared and unarmed, he was ruthlessly slain, and with him the chance companion of his home, McIntyre, also perished.

With this crime thus committed you fled, and were this all, the penalty which the law imposes would be abundantly merited; but is this all? Is there behind this even a darker chapter, a story untold, that makes this crime even more heinous than thus recited? In my opinion there is, and in no spirit of unkindness, no wish to make your position any more distressing than it is, I purpose briefly reciting those reasons which satisfy my judgment that murder was planned and contemplated as well as robbery. These are my reasons. With a minutiæ of detail which is rarely exhibited and that I have never seen paralleled, every preparation and every arrangement for robbery was made with the most consummate skill; the means by which your victim was to be overpowered, by which he was to be bound and secured, by which he was to be tortured, and by which he was to be slain, were all prepared in advance, and yet with all this there was not one preparation made for concealment or disguise—not a single arrangement for escape or flight. If your own story be credited, you proposed returning to Los Gatos, and, with the man who planned this crime, living in idleness and pleasure upon the spoils of your victim. Did a plan thus carefully concocted, and thus skilfully arranged, overlook the fact that these two men would return to Los Gatos and that they would describe you and Showers so that no one could mistake your identity?

Did you imagine that they could be living there, and you living undetected within four miles of where they had been plundered? You intended that no living witness of your crime should remain behind you.

There is more—You made no preparation for flight, every arrangement was complete. At Los Gatos you left the implements of your trade where you laid them down as though you were simply retiring for a moment for a repast; your clothes at the hotel, your bills unpaid and uncollected as though this were an interregnum of but an hour. You did intend to return, and you did intend that no witnesses should ever appear to tell of the crime that you had committed. Nor was this all. With the equipment that you took with you was a butcher-knife, purchased shortly before the occasion, deadly and cruel. Why was this needed? Firearms in abundance—two pistols and a double-barrelled shot-gun were a part of your appliances. And what was the purpose this knife was to play in this tragedy? To this I can make but one answer. The report of firearms might have attracted the attention of some passer-by—might have aroused the suspicions of some neighbor and brought some witness of your fell deeds to that place. The butcher-knife was taken because it was silent as well as certain, and that was the means by which these men were to be done to death.

Is that all? This wicked story does not end even here. In the equipment that was found at the place where you encamped on the first evening was a block; its purpose, declared by yourself, to measure the time in which incendiary fires might be kindled; and upon your person were taken the four candles that would have measured the space of time in which the fire you were to kindle should blaze forth. What was the purpose of that block on an expedition of this character? Your confederate Showers said on his examination before the committing magistrate that "you were to drag the old man into the fire and burn him up." He gave it again on your trial here: "Something was said about burning the old man up." That block and those candles and the knife and the equipment speak plainer than words could do the manner in which you purposed that your crime should be concealed and its consequence escaped. You trusted to the concealment of the grave and to that alone for your own immunity. In no other light can I view these circumstances—in no other shape can I marshal or read them. A horrible and wicked crime they indicate, and one that if murder be ever punished with death that penalty is more than merited by all who were parties to it.

With this crime upon your hands and these evidences behind you you fled, and in your flight I find another evidence of the fact that murder was preconceived. There was no preparation made for it. With horses suddenly stolen and hastily and half equipped, with harness for bridle without saddle, showing that it was a thing unanticipated and unexpected, you took your departure. It may be inquired why was this? Why, not having purposed flight, did you finally flee? The answer is obvious. It is given by the testimony of Showers. It is given in the position in which your victims were found. You feared that McIntyre was not slain. It was the fear that this witness survived that suddenly introduced flight into a scheme in which it was not before contemplated. You fled; but the curse of Omnipotence against the earth's first homicide yet lingers on earth; the blood of your victims cried from the ground. On every side men went forth in your pursuit; the darkness through which you traveled blazed like noon-day. The companion that shared your crime walked as a traitor by your side. The witness you had slain lived again in the confederate who betrayed you. The wilderness through which you fled thronged with avengers of blood. You were apprehended and brought here. Alone and friendless, your position might well excite sympathy. But when one measures this crime by its attendant circumstances the channels of sympathy are frozen. And neither palliation nor excuse can be imagined.

A jury of your countrymen was called, and before them you attempted with stammering tongue and palsied lips to tell your story! A pitiful story! A guilty conscience behind it, and the explanation was but a confession of guilt. You were convicted. A verdict which the community and the Court thoroughly and fully approved, if for nothing else than that it teaches the lesson sometimes forgotten, that in the fearlessness and firmness of the juror the safety of the citizen is secured. And this is the crime for which you are here called to answer, and this the verdict which convicts. In such a crime I find no element of extenuation. I find no measure of palliation. The law declares the judgment which the Court pronounces. That penalty is death, and no man can question that this punishment is fully merited.

Indulge in no vain illusions, nor hope that the sentence thus pronounced can be averted, or even long delayed. Your days upon earth are numbered, and are few. For that fate prepare yourself as best you may.

It is by the Court adjudged that you be by the Sheriff of this county kept in some secure place, and at the time to be hereafter designated you be by him in the manner and as by law provided hanged by the neck until you are dead, and may God have mercy on your soul!

Friday, July 27th, will be the day designated in the warrant for the execution of this sentence.

SENTENCE OF MAJORS.

Lloyd L. Majors, stand up. The same question was then repeated to Majors, to which he answered that he had no cause to show. Before referring to your participation in this crime, I deem it befitting this place, and due from myself as the Judge of this Court, that I call attention to the position of the jury, upon whose verdict I am now called to pronounce judgment. The fact that in your case death, the extreme penalty of the law, was not adjudged, has been the subject of much comment and animadversion. Permit me, speaking for those jurors, to say, that, in the intelligence manifested in their answers upon examination, in the careful attention given during this trial, they showed themselves fully the equals of any members of the community from which they were selected. The verdict that they pronounced was the highest known to the law—murder in the first degree. It was the crime that was proven, and proven conclusively, against you. The law in its wisdom has seen fit to reserve to the people the prerogative of adjudging the penalty of imprisonment for life, or death, to be by them exercised through the jury-box; that prerogative this jury were pleased to exercise, and for this they have been censured. Permit me to say for those gentlemen, not now in a position to speak for themselves, what I understand to have been their situation: It was that the verdict that they then pronounced had to be returned or a mistrial must ensue; that had another trial been had, it was more than probable, with the feeling aroused in this case in this county, and the publicity that it secured through the journals, that a transfer to another and perhaps distant county would have been insuperably necessary. In such a transfer, in the situation in which the principal witnesses for the people were placed, with the apathy which invariably attaches to repeated trials, it is more than probable that a result even less acceptable than the present would have been reached. Those gentlemen in the jury-box were doubtless oppressed by these considerations; they appreciated the condition of this case, the situation of the county, the position of the witnesses, the probable consequences of a failure to agree, and they returned such a verdict as they best could. Permit me, speaking for those gentlemen selected from the citizens of this county, giving their time at much personal inconvenience but without murmur and without complaint to this ungracious duty, and who have now returned to the body of the citizens, permit me to ask for them that which the District Attorney demanded for this wretched man now before me, "that there be justice done." This much for you, the jury.

Lloyd Majors,—If the views that I have indicated in pronouncing judgment on your wretched associate be well founded; if I have justly estimated the testimony in this case; if I have properly weighed it, and drawn those inferences which a cautious judgment would commend, your offence is not second in atrocity or in heinousness to that of Jewell, just sentenced to death. If he is believed, you are the planner and instigator of this crime, and this the verdict in your case finds; your appearance before the jury—the skill and adroitness that are unquestionably in a very large degree yours—leave in my mind no doubt that this is in a great measure the case; that this did have in your fertile and wicked mind its origin and its inception.

Recognizing as I do to the fullest extent that the testimony of an accomplice is justly discredited; that one who admits himself infamous should have his evidence received with caution and weighed with the utmost circumspection; I purpose to examine your case, and for the reasons already given, that the public may know that the judgment is no more than just. In so doing I propose to judge of your accountability by your own acts, and to leave the testimony of Jewell and Showers to weigh what it may with those who may be disposed to value it. I propose asking whether in your own actions, and your own declarations, and your own conduct, there is not a constant recognition of your complicity in this revolting crime. I pass the fact that you and Jewell were upon intimate terms as of little weight; a man who resorted to your place of business might well hold this relation to you. I pass the question of whether your journeyings to the vicinity of Renowden's indicated crime, or simply the courtesy of companionship; those things are not incompatible with innocence. The fact that this crime was committed by Jewell with weapons furnished by yourself—with pistols, with cartridges, with knife, with equipment in every particular supplied by yourself—I do not pass that in silence: for while it might be explained, it has certainly in this case a most sinister significance. That this man Jewell knew of his own guilt; that he knew that two men had been murdered by himself and his confederate; this he admits, and no one longer questions. With this crime in his own knowledge, and with this blood upon his hands, he hastens to your saloon and has with you a secret and hurried interview. A confederate could not do more. To an innocent man he would never have gone with such evidences of violence and the proofs of such a crime upon him. He came to your place then swiftly and secretly. His explanation is given, and I pass it without comment. What is the explanation you give of this visit? That the Saturday night before, in a difficulty in San Jose, there had been a great deal of shooting; that it was necessary that he should flee, to conceal himself from the officers. With this statement, wounded and bleeding, he came before you, as you stated, with a severe bullet wound on his forehead and a broken and crushed finger; you saw them both. What did you fancy the crime from which a man thus mutilated must fly? You must have felt well assured that there was a murder behind it, and a homicide at least, when Jewell, thus wounded and thus mangled, was still the aggressor, and must fly from pursuit. What was the explanation that brought him there to your house at that hour of the night? That he had lain out all night the night before, and all that he asked at your hands was a flask of whisky. Did it not seem to you, with your sagacity, that that was a paltry pretext—a senseless act for a man whose liberty or life were endangered, that he should go from the scene of his crime to the place of his recognized residence to ask for so paltry a boon as a bottle of whisky?

This story does not seem to have surprised you; but he came and he vanished into the darkness, and you say you knew no more of him. What was your course thereafter? The next morning at 6 o'clock you met John Daves; you told him that Jewell was there with a queer story from San Jose; that he had been in a shooting scrape; that he had the marks of a bullet plowed across his face, and a broken and crushed finger. Why did you tell this to John Daves? What purpose had you to subserve in thus betraying the confidence that Jewell had reposed in you? He was seeking concealment, and to the first man you met on the next day you revealed his connection with some unknown crime, and that the officers were in his pursuit, and thus indicated where he was most likely to be found. The answer in my judgment is this, and is plain: You knew that with the morning's sun messengers would come from the mountain blanched with terror and with a tale of horror of two men murdered in cold blood and in sight of their peaceful village. You knew that instantly there would be a blaze of inquiry, that Jewell and Showers had fled, and that suspicion would be at once attracted to them; you knew there were two witnesses of the night before—Velasco and Grant—to the clandestine interview in your saloon; you knew that you would be called upon to answer, Why did these men thus meet you and then flee away? And you thought to anticipate the question by informing Daves that this was the story Jewell had brought to your ears. These questions you knew would be asked by a hundred suspicious citizens, and you sought to anticipate them craftily and cunningly, but mistakenly for yourself, as the sequel has proven. Was that all? Officiously assisting the officers, you asked John Daves, when he visits San Jose, to enquire whether such a crime had been committed. Had you any reason to suppose that Jewell invented a crime that had no existence? Was there anything in his appearance, in his manner, or in his flight, to indicate that he had fabricated this story of a difficulty in which he was the aggressor, and he must escape? And yet you made it the mission of Daves to ascertain whether this statement of Jewell be true. It was part of the same scheme and the same purpose. It was answering by anticipation the question that you knew would be asked—and striving so to answer as to divert the suspicion which you knew must concentrate upon yourself. Your visit to San Jose, your inquiry at the "Red Retreat," are full of significance. You pretended to describe to the inmates of that house Jewell and Showers, and how did you describe them?

You refer to them as one a tall man and one a short man. You tried to induce those people to concede that these were the men that had been at that saloon on that occasion. They denied it. They assured you that it was not these parties; that they knew well who it was; that there was no point of resemblance between them. What was that that had impressed you most on Sunday night, and yet you omitted in this description to the people in the "Red Retreat"—that would have suggested itself most vividly to any person, quickest observed and last remembered? It was that one of those men was stained with blood; that a bullet had plowed a furrow across his forehead, and a blow had crushed his hand. You would have said, "The man that I am describing is stained with blood, maimed and bleeding. Do you know such a man?" That, as a description, would have suggested itself first. Such an assertion would have met with an instant response of assent or denial; and that most significant circumstance was wholly omitted. You did not ask that question, for you knew the answer would be that no such men have been here. The men that were engaged in the friendly scuffle at this house played the part of Good Samaritan, and remained for hours helping the man that they had injured. There was no blood and no stains, none of these signs of strife upon them. You asked no such question for you knew well what the answer would be. Well knowing that Jewell and Showers had not been at the "Red Retreat," you assured the officer that they had, and endeavored to have the officer who was in pursuit of Jewell recalled. Your reason for this is apparent; you had before endeavored to divert suspicion from yourself by directing it toward Jewell, your tool and instrument. You now feared that the confederate you were then sacrificing might in his turn betray you, and you now sought to mislead the officers, and facilitate his escape. It was this that inspired these efforts upon your part, these false and misleading statements by which you hoped to deceive the officials. If to the men who executed this bloody deed, who were your too willing tools, death is a fitting punishment, the heart that conceived, the mind that planned this atrocity in all its fearful details, can merit no less. But, as I have already suggested, the penalty was in the discretion of the jury—the soundness with which that discretion has been exercised it becomes me neither to question nor criticise. That discretion has given you the boon of life—the life of a felon, in a felon's cell—

with the memory of this double murder to haunt you sleeping and waking while you shall live. The penalty they have affixed is here repeated as the judgment of the Court—that you be imprisoned in the State Prison of this State for your natural life.

SENTENCE OF SHOWERS.

John Showers, stand up. The same question was propounded to John Showers. He answered that he had nothing to say. In this case it was claimed for you by your counsel that mental weakness and infirmity, and the fact that you were under the influence of liquor at the time of the murder, and also that you made a full disclosure of this crime and of your associates, are to be considered as a palliation of your offence; and these considerations were urged upon the jury as reasons why they should spare your wretched life. I purpose briefly considering these propositions, and announcing the single one upon which I approbate that conclusion. That you were easily influenced and led astray by these men is, in my judgment, entitled to no consideration whatever. You had abundant capacity to know the character of the crime that you were contemplating. You had abundant opportunity and time to deliberate upon its consequences to your victims and to yourself. A grown man, for many years your own master, engaged in different vocations, if you were not capable of estimating this crime and its consequences, few men in the community are capable of appreciating either the nature or the enormity of such an act. It is said that you were drunk, that it was under the influence of liquor that this crime was committed. Concede it to be so; that it was the liquor that Majors furnished you that nerved your arm on that night to this fell deed. Behind that hand was a heart already utterly depraved; you had for two weeks been deliberating upon this crime; you had frequent consultations with your associates about it; had estimated and prepared all the means and all the appliances by which it could be most successfully accomplished.

To hold that drunkenness at the moment that the crime is committed, where it has thus been for weeks pre-arranged and pre-conceived and pre-purposed, even palliates crime, is giving to drunkenness an absolution that finds no countenance in this Court. In the fact that you were drunk I find no excuse, I question very much the extent of the drunkenness that has been asserted. It is claimed, however, that you rendered to the State valuable assistance, and this I concede. It is the policy of the government that treason and traitors in crime should have constant recognition in Courts; that in the crimes of the future it should appear that there is some immunity for those who may render efficient aid to the officers in the detection and exposure of their confederates. That aid you afforded, and for that reason, and not that you merit in the slightest degree the leniency of the jury, is the verdict that spares your life approved. That this, the policy of the past, may tend to the security of the future, and that it stand as a reward to the traitor and the informer to promptly reveal the perpetrators of those crimes that might remain undetected were not this immunity afforded. For these reasons, and these alone, you are suffered to live. The judgment of the Court is that you be imprisoned in the State Prison for the period of your natural life.

In pronouncing these judgments I have deemed it my duty to advert to the circumstances which characterize this offense. It is with no desire to add aught to the weight that is crushing these unfortunate men, one pang to what they must inevitably suffer. I make these suggestions so if in the future, however distant, misjudged sympathy shall seek to mislead executive judgment or executive clemency, my appreciation of the atrocity of this crime and of the entire accountability of all concerned in its perpetration shall remain as part of the history of the case.

LEMUEL LYTLE.

[Note.—In June, 1883, Lemuel Lytle, a painter residing at San Jose, while under the influence of liquor, attacked his wife with a butcher-knife. She was badly wounded from a stroke across the arm, and, in endeavoring to defend herself, received several cuts in the hand. Lytle was arrested, and at once gave a full statement of the affair and of the circumstances which led to it. He had separated from his wife, but still continued to visit her, and it was his jealousy that induced him to make the murderous attack. When the case was called before Judge Belden, the District Attorney stated that Lytle desired to withdraw his plea of not guilty (the charge being an attempt to commit murder), and to substitute a plea of guilty of an assault with a deadly weapon, the penalty for the latter crime being much less than that for the former. The Court accepted the plea but delayed sentence two days, intimating that he desired to hear Mrs. Lytle before concluding the case. At the appointed time the Judge pronounced sentence in the following words:]

The other day, Lytle, when the District Attorney made his statement of the case, I was strongly impressed with the serious and aggravated nature of your crime, and had not the law left me the power to adjudge the penalty in the proper degree, I should not have allowed your plea to be taken. The law permits the Court to adjudge the offence a felony or a misdemeanor in its discretion. Not content with the statement made by the District Attorney, I have availed myself of all the opportunities afforded me for an inquiry into the circumstances of this case. They are represented as follows: You have been intemperate for years, and that woman whom you have called your wife has been driven on more than one occasion to fly from home on account of your ill-treatment and brutality. In your case drunkenness has been the rule, and when drunk you have abused your wife constantly and to the extent of your power. For the purpose of avoiding this brutality, she left your home and endeavored to maintain her family by her own exertions. You followed her to her retreat, you went to a drawer and took therefrom a butcher-knife and inflicted upon her a serious wound. To all these circumstances as stated, you deny that you were conscious of your acts or their character; you assert that you were so drunk that you appreciated neither the act nor its consequences. This I do not believe. I believe you understood your acts perfectly; that you knew you had a wife; that you had the intelligence to go to her abode; that you had an appreciation of her former relations with you and insisted upon their being resumed; that you had the judgment to go to the table drawer in the kitchen and from the knives therein to select the one best adapted to the murderous assault; that you had the intelligence and the capacity to pursue and stab her, and when she attempted to pull herself away you drew the knife through her hand and cut it severely; that you knew enough to fly from the house when a man entered and intervened; that as the assault was cowardly so was the flight. These are the facts, and a man capable of doing these things understands what he is about and is justly amenable to the law. Sitting here as I do, I see instances where wives who are compelled to submit to drunkenness and brutality on the part of their husbands find a remedy in proceedings for a divorce. I know the custom in this State and nation is for the husband who has become the plague and the tyrant of his wife to pursue and kill her, and then find some degree of commiseration in the maudlin sympathy of jurors. With that sort of thing I have not one particle of sympathy. A man who is brutal towards his wife has no right to follow her and persist in his enmity when she has left him and sought shelter elsewhere. Drunkenness and brutality are unfit associations for a wife, and when these conditions exist she will secure protection from this Court. This is your case, and I regret to say similar acts have caused many unhappy women. In this case the suggestion has been made that there is some cause for your conduct toward your wife, in the feeling of jealousy you entertained on account of her relations with others. If that be so, then your tongue should have been the last to have censured her, your hand the last that should have done her violence. It was your brutal conduct which caused her to depart from your house and deprive herself of the protection of a husband. If in all the world there was one man whose voice and hand should not have been raised against her, then you were that man. For this conduct of yours which jeopardized her life no ordinary penalty should be awarded, and the suggestion that this be considered a simple misdemeanor with the punishment of a few days of idleness in the county jail neither meets my approval nor will it receive my sanction. I shall impose a penalty commensurate with your offence, so that this woman may be freed, for a time at least, from further exhibitions of your drunkenness and brutality. The judgment is that you be confined in the State Prison for a period of two years.

PEOPLE vs. AH CHUNG.

DECISION RENDERED JULY, 1883.

Upon the 9th of May, 1882, the following ordinance was passed and approved by the Mayor and Common Council of the City of San Jose:

"Section 1.—It shall be unlawful for any person or persons, within the limits of Oak Hill Cemetery, to explode firecrackers, bombs, or anything of an explosive character, to burn paper, to light tapers, or to kindle fires. Provided that nothing herein shall be construed so as to prevent the firing of salutes at military funerals or at any memorial service."

"Section 2.—Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the City Prison not exceeding thirty days."

This ordinance, duly passed and approved, was published as by law required, and has been and still is in force as an ordinance of the City of San Jose. Oak Hill Cemetery is a public cemetery of the City of San Jose. It is located without the geographical boundaries of the city as established by the Charter of 1874, now in force. Within this cemetery, both before and since the enactment of said Charter and both before and since the passage of said ordinance, there have been buried large numbers of the dead of the Chinese population of this city and of the vicinity. It is, and from time immemorial has been, the usage and practice of the Chinese as a people, upon stated occasions, to repair to the graves of their dead and upon and about the same to practise a certain ceremonial. In part this ceremonial consists of the burning over the graves of papers upon which are prayers and invocations to the dead, and of the burning of small tapers which are placed upon the graves. These are religious rites inculcated by the religious teaching of this people, prescribed with minuteness in their religious ceremonials and of universal observance by them. Upon the day designated in their rituals for the observance of this rite and in performance of it, the defendant, Ah Chung, himself a Chinese, with many others of the same race, repaired to Oak Hill Cemetery and, over the graves of the Chinese dead at that place, burned a large number of papers and tapers, as upon their part a religious rite and duty. For so doing, in violation of the ordinance above recited, the defendant, with others similarly engaged, was arrested and brought before a Justice of the Peace of the City of San Jose. He demanded a jury trial, which the Justice refused, and, being convicted, he was sentenced to pay a fine of $10 or be imprisoned until the same should be paid. From this judgment and conviction he now appeals, and claims:

First.—That the City of San Jose has not the power by ordinance to make any act criminal which is committed without the boundaries of the corporation.

Second.—That the defendant has under the Constitution an absolute right to a trial by jury of which he cannot be legally deprived.

Third.—That the act for which he is prosecuted is a religious observance in which he is protected by Article 1, Section 5, of the Constitution of the State.

It is further insisted that the ordinance in question is partial, unreasonable and discriminating, and therefore void.

Upon the proposition that the ordinance, creating as it does a criminal offence, is inoperative without the territorial limits of the city, I find no authorities in point. It may however be conceded that unless empowered by the Charter, or such power be necessarily implied by other powers granted or duties imposed, such jurisdiction does not exist. That it is in the power of the Legislature to extend as it will the power of inferior political organizations is well established. (Blanding vs. Burr, 13 Cal., 343; Kelsey vs. City of Nevada, 18 Cal., 629.) Two sections of the City Charter refer to the extra-territorial property of the city and provide for its regulation by the city. Section 67 relates to the "City Reservation," and provides:

"The Mayor and Common Council of said city are hereby authorized and empowered to pass such ordinances as may be necessary for the preservation of such reservation or park for the public use."

Section 68 reads:

"In addition to the powers hereinbefore granted, the Mayor and Common Council of the City of San Jose shall have power to purchase lands for cemeteries or burial grounds and to provide for the government, care and regulation of the same."

What was this power thus given to enact rules and regulations? Not merely that the city could enforce her civil rights as against trespassers that she had under the statute, as has every other owner and proprietor. It was more than this or it was nothing. Considered with regard to the character of the property, the uses and purposes of the place, it was to control, protect and conserve the same as the purposes of security, decency and decorum should require. It was to protect the premises from the intrusions of rowdies, from exhibitions of ruffianism, graves from the desecration of vandals. It recognizes the fact that there might be invasions of this place, outraging the sense alike of decorum or decency, in which civil remedies might be inapplicable or ineffective, either from the nature of the act or the perpetrators, and it gave the power to punish as a crime when the exigency should require it. In the authority bestowed to enact needful rules and regulations, I find the "power" to enact the ordinance in question.

The second question presented, the denial of a jury trial, is one that has been often before the Courts and has received the fullest consideration. Without citing any of the multitude of decisions upon this point, I give the results as I gather them from the cases. In all cases in which a felony is charged, in which the punishment is or may be imprisonment in a State Prison with its attendant consequences of infamy and political disability, the right of trial by jury is absolute, and one of which a party cannot be deprived under any circumstances whatever. In this there is no disagreement in the authorities. Again, when the offence is a misdemeanor created by statute, but punishable only by fine or imprisonment in a county jail, the authorities are not uniform as to whether the party is entitled, as an absolute right, to a jury trial, but in such cases the rule is well settled that if an appeal be given to a Court in which a jury trial may thereafter be had, the constitutional requirement is complied with and it is not error to refuse a jury in the Court of first instance, and this rule applies even though the party be required to give bail for such appeal, or whatever other legal impediments may embarrass his remedy in this direction. In the very large class of minor offences, such as drunkenness, vagrancy, disorderly conduct, acts or omissions which endanger the public peace, quiet, health, or safety, in which the offence may be wholly created by ordinance, or in which the ordinance may repeat a statutory provision in which the punishment is limited to a fine or imprisonment in a city prison or a county jail for a limited period, the overwhelming authority is that the party is not entitled as of right to a jury trial. Of this class is the case at bar, and it was not error for the Justice to refuse a jury.

Is this an interference with the free exercise of a religious profession and worship guaranteed by Article 1, Sec. 12, of the State Constitution? The opinion of C. J. Morrison, in *ex-parte* Burbe, 59 Cal., is relied on in support of this proposition. Said the learned Chief Justice:

"It is very clear therefore, and no one would have the presumption to deny the proposition, that if the Act now under consideration does in any manner interfere with the free exercise and enjoyment of religious profession and worship, it is unconstitutional and absolutely void."

This language was used in an opinion upholding the validity of the Sunday Law, and the language of the Chief Justice certainly goes as far as the provision of the Constitution which he is examining. That reads as follows:

"Article I., Section 11. The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall forever be guaranteed in this State, and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief, but the liberty of conscience hereby secured shall not be construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the State."

In this it will be seen that very substantial police power is reserved by the State, in the very section in which she thus guarantees religious freedom. By this provision neither polygamy nor concubinage would find immunity, however religiously believed or devoutly practised, and all practices inconsistent with the peace and safety of the State, by whatever creed they may be enjoined, are not only without the protection but within the ban of the Constitution itself. Would it be tolerated that the State must stand supinely by and permit its citizens to maim or mutilate themselves as a religious duty? Is it powerless to prevent those who should be its strength and protection thus making of themselves cripples and beggars because this is their religion? Can it be contended that Christian flagellants and Hindoo Fakirs can parade their scourgings and tortures without hindrance because it is to them an act of devotion? Or, passing from the religious observances of the living to the funeral rites, the Parsees, fire worshippers of Asia, and disciples of Zoroaster, are the representatives of a very high and ancient civilization worshipping the elements, fire, earth and water. They hold it an inexpiable sacrilege to consign their dead to any of these sacred elements, and the corpses of this people are therefore exposed upon lofty towers, to vultures and carrion birds. Would such a custom, revolting perhaps from its novelty, be beyond the privilege of our laws? Or could an African chieftain slaughter over his deceased a host of beasts and transfer the cemetery of a civilized people into a shambles upon the ground that this is his religion? This cannot be the religious freedom guaranteed to all, and yet all this and more is within the rule contended for by defendant. I understand, as construed by the authorities and interpreted, sound judgment to mean that as to the beliefs a man may entertain, the faith he may profess, there shall be no interference. He may believe or deny as he will; of neither will the State take concern or cognizance. That of the forms or practices of such profession she takes no heed unless there shall be subversion of general morality, or an interference with the rights of another. He may believe as he will the teachings of Brigham Young. He will not for that reason be allowed to practise polygamy. He may accept as a cardinal doctrine of his creed, indispensable to his salvation, the mysteries of the Endowment House. He will not be allowed to practise its abominations; though commanded to "cry aloud and spare not," he will not be allowed to interrupt the assemblages of others by his own denunciations. In short, whenever the practices of his creed are subversive of general morality, endanger the safety of the State, interfere with or disturb others in the enjoyment of their rights, or shock the feelings and sensibilities of those before whom they are exhibited—not as being a devotional exercise at variance with the religious beliefs or teachings of a sect, or profession, but as a violation of those general rules of humanity or decency that are recognized by the many—in such cases the law interposes, not as interfering with the religion of the one, but that it may protect the rights of the other. It is thus the great moral rule, "Do unto others even as ye would others should do unto you," finds its application in the maxim of municipal law, "So use your own as not to injure another." It is for this that the law interferes, not as preferring the one, but in the performance of that higher and paramount duty, the protection of all.

Nor is this ordinance obnoxious to the objection that it discriminates unjustly as to class or race, or at all. Its prohibitions are as to acts. Its penalties are as to all who may infract its commands. The building of fires, the use of gunpowder explosives, it inhibits alike to Caucasian and Mongolian, and does not require the one to observe as a law what the other may with impunity disregard as an interference with some tenet of his religion. It is further objected that this ordinance is unreasonable. It is well settled that the Court will take notice of the climatic conditions of the country and of the general usages and practices of communities and of the ordinary habits of men. Thus instructed, the Court knows that from the dry seasons, the mass of combustible matter which covers the fields, and the strong winds which prevail at certain seasons, fires are the most formidable of dangers. That the statute books of the country are full of penalties for those who carelessly kindle fires in either field or forest. That among the most frequent causes of conflagrations are firecrackers and bombs, and that these are reluctantly tolerated on a single anniversary and strictly prohibited at all other times. From these facts, equally within the knowledge of all the Courts, none can but know that the practices here inhibited are the fruitful source of the gravest of dangers, and that the ordinance which seeks to restrict this evil by legislating against one of its most pregnant causes is neither unreasonable nor improper. I see no reason for holding the ordinance or the proceedings had under it invalid.

CASE OF THE PEOPLE EX REL. R. HEALEY vs. J. M. PITMAN, COUNTY AUDITOR.

DECISION RENDERED AUGUST, 1883.

The plaintiff, a duly qualified and acting constable of Santa Clara County, upon the 30th day of June, 1883, presented his claim for $91.95, for official services to the Board of Supervisors of Santa Clara County. It was duly allowed by the Board, and the defendant County Auditor was directed to draw his warrant upon the County Treasurer for this amount. The defendant refused to draw such warrant, and assigns as reasons for such refusal that the plaintiff has not complied with the requirements of Section 167 of the Act of 1883, entitled "An Act to establish a uniform system of county and township governments." This section provides that a sworn statement is to be made by the officer upon the first Monday of each month of the fees by such officer collected during the preceding month, and with this statement he shall pay in such fees to the County Treasurer.

Section 170 reads: "The Auditor shall not draw his warrant for the salary of any such officer for any month until the latter shall have first presented him with a certificate of the County Treasurer, showing that he has made the statement and settlement for that month required in this Act." It is not claimed that any such statement has been made or attempted, but for plaintiff it is insisted that the Act in question is unconstitutional and void.

The following are the sections of the Constitution relied upon by plaintiff: "The Legislature shall not pass local or special laws * * * regulating county and township business or the election of county and township officers." (Sub. 9, Sec. 25, Art. IV.)

Further: "The Legislature shall establish a system of county governments which shall be uniform throughout the State." (Sec. 5, Art. XI.)

"The Legislature, by general and uniform laws, shall provide for the election or appointment in the several counties of Boards of Supervisors, Sheriffs, County Clerks, District Attorneys and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers in proportion to duties, and for this purpose may classify the counties by population. (Sec. 5, Art. XI.)

Assuming to perform the duty imposed by this section, the Legislature of 1883 enacted the statute in question. This enactment shows a complete and comprehensive scheme for the regulation of all county governments, and as to officials, terms of office, duties and modes of procedure, is co-extensive with and uniform throughout the State.

In it, however, provision is made for the varying compensation of officials, and as a means to that end the fifty-two counties of the State are divided into forty-eight classes. This classification, it is contended, substantially makes of each county a class, and is in fact and effect an evasion of the inhibition upon special and local legislation. It is further objected that as this compensation does not conform to the actual ratio of population, this is a further violation of the constitutional requirement.

For the judiciary to declare absolutely void the action of a co-ordinate branch of the government is always a proceeding of much delicacy, and only to be exercised with the utmost caution, and in the clearest cases. In some of the States and in certain cases this high prerogative is only exercised by the Courts of last resort. The conditions under which the Courts will thus interpose have been often declared, and are perhaps much better defined than observed. A single decision of our own Supreme Court may be taken as fairly summarizing a multitude of adjudications. Says the Court: "The power of the judiciary to declare a statute unconstitutional should never be exerted except when the conflict between it and the Constitution is palpable and incapable of reconciliation." (S. V. N. N. Co. vs. Stockton, 41 Cal., 147.) Apply this rule to the sections criticised. What provision of these sections cannot be reconciled with the Constitution, in fact is not in strict obedience and exact conformity to it? The principal and controlling feature of Section 5 of the Constitution was discrimination—the common-sense recognition that with counties ranging in population from a quarter of a million to five hundred disparity as to services demanded differences as to compensation.

The constitutional command was to regulate according to duties, and assuming that classification by population might facilitate this regulation, it permitted such classification. If in other sections of the Constitution uniformity was required, and local legislation inhibited, in this provision of the same instrument discrimination by locality was the result intended, and nonconformity the command.

With this the purpose in view, compensation to be measured by duties, the larger the classification the nearer this result is attained. Were all the counties in the State grouped in ten or twelve classes, very great disparity in population would be found between counties thus united, while the compensation of officials must be the same in all of a class. Could the constitutional direction be followed with precision, and officials compensated in the exact proportion to duties; were duties and services capable of such accurate ascertainment that they could be formulated with the same accuracy as population; the legislation that with such light should seek to obey the constitutional requirement would undoubtedly create as many classes as there were counties. The method pursued approximates that result nearer than any smaller classification could do. And is the solecism to be indulged that that legislation which comes nearest exact compliance with the Constitution most transcends constitutional authority? Again, if the course here pursued is to be abrogated by the Courts, what mode or measure of classification can be made not obnoxious to this same objection? San Francisco has a population of over a quarter of a million. The next county in order has a population of about one-fourth that number.

If the requirement is to be observed that compensation is to be regulated by duties, and as these are to be adjusted by an estimate of population, San Francisco will undoubtedly constitute the single county of a class for all time to come. And as to this portion of the State, comprising over one-fourth of its population and nearly one-half of its taxable property, legislation upon all matters of county government must in effect be local and special, and compliance with one feature of the organic law must violate another and equally imperative one. This is certainly the result, and if the objection urged be sound, the paradoxical proposition is presented that the Constitution is itself unconstitutional.

Again, while the Act provides forty-eight classes, it by no means follows that this number will be found in the adjustment of the counties to this arrangement. In fact, no county now comes within the twenty-second class, and by increase or changes in population the number will undoubtedly materially diminish. Will such a result affect this question, or should a comparison of these classes with the Federal census show that all the counties would fall within ten classes, could such a result (answering, though it would, the plaintiff's objection) be here considered? To entertain such a proposition would be to judge of legislative powers, not by comparison with the authority, but by the consideration of its results; not by what it has the right to do, but by the consequences of what it has done.

These suggestions will indicate a few of the many difficulties that must follow from judicial interference in this case; but the question is not one of necessity, of convenience, or of policy. It is simply one of power. That which is not prohibited, either in terms or by necessary implication, remains with the Legislature, and, as already stated, discrimination is not merely permitted—it is commanded—and in an instrument bristling with limitations upon legislative action, classification as a means to this end is permitted without qualification or restriction.

If it be thought that this section is at variance with other features of this instrument, or repugnant to its general spirit, the answer is that Section 5 is special, directed to and intended for a particular purpose, and the rule obtains in the interpretation of the Constitution, as of legislative enactments, that that which is special and particular shall control that which is general and universal. The further contention that in this Act compensation is not regulated by actual population is answered by the section itself. It is not population, but *duties*, which are to be made the measure of compensation, and classification by population is but a means to facilitate this adjustment. To have adopted any other estimate would have been a palpable violation of the constitutional requirement. That the compensation does not in every instance follow the ratio of population does not show that it has not been properly adjusted as to duties; and while the framers of the Constitution could have placed this proposition upon the simple basis of population and made the question one of law, they have left it one of fact, to be determined by the Legislature upon the comparison and consideration of all those facts which may make the performance of prescribed duties more or less onerous and expensive. That determination must be final and conclusive, for how could a Court engage in the inquiry as to whether in fifty-two counties the required proportion between services and compensation had been correctly adjusted or accurately maintained? Were such inquiry attempted, what would be the result were different Courts to differ upon this matter of fact, and where would be the remedy in such conflicting decisions?

The cases of Devine vs. Commissioners of Chicago, 84 Ill., 591, and Earle vs. Board of Education of San Francisco, 55 Cal., 481, are cited by counsel. Both decisions were by a divided Court, but independent of that fact, the cases are readily distinguishable from the one at bar. In both of these cases, subsequent legislation, in its intended and in its necessary effect, was applicable to but a single city of the State, and this was held obnoxious to the constitutional requirement of uniformity. Neither presented the proposition here discussed—that the Act now brought in question is the primary action of the Legislature, in obedience to the command and pursuing the precise method indicated by the Constitution itself.

This opinion has been submitted to my associate, Judge Spencer, and I am authorized to state that he agrees with the views here expressed and conclusion reached. The writ is dismissed.

CHAPTER XIII.

LOVELAND vs. LOVELAND.

DECISION RENDERED SEPTEMBER, 1883.

The testimony in this case shows that the plaintiff and the defendant are husband and wife—married for over thirty years. That since their marriage they have acquired property, real and personal, to the value of $8,000 or $10,000. That in the year 1881 the defendant abandoned plaintiff and has not since returned to her, nor has he during this time in any way communicated with her. While there is no evidence showing that the separation was actually collusive, there are circumstances indicating that plaintiff made no very earnest effort to retain the defendant in the family, and under the special surroundings of the defendant perhaps she ought not to have been expected to. Without discussing those circumstances, I am of the opinion that plaintiff had a right to consider herself deserted, and to proceed accordingly. The property question is not so easily disposed of. The defendant when he left the plaintiff made to her a lease for the term of five years, with the privilege of ten, of all the community real estate—then and now of the value of between $7,000 and $8,000. The plaintiff accepted the lease, and by its terms agreed to pay to defendant a substantial rent—$350—for the first year, and to increase each year until the expiration of the term. It was further provided that the plaintiff should have the entire and exclusive right to the control of the leased property, and that the defendant should have the right to go and come as he pleased during this time. The defendant, after making this lease, departed from the place and has not been heard from, and service is made upon him in this case by publication. The rent stipulated for in the lease was for two years deposited to the account of defendant in the Bank of San Jose, but not being called for by the defendant, was afterwards withdrawn by the plaintiff. After the execution of their lease, and after the departure of the defendant, the plaintiff filed a homestead declaration upon this place, and now insists that she is entitled under the provisions of the Code to have the whole of their property set apart to her in the decree of divorce. Whatever might have been the rights of the wife independent of this lease, it is very apparent that this instrument cannot and ought not to be disregarded in the disposition of their property. It is perfectly apparent that when the defendant gave and the plaintiff accepted this lease, both recognized the fact that the husband was still to retain an interest in this land, while it is equally apparent that if plaintiff did not actually consent to the departure of defendant, she must have understood that this was intended. Under such circumstances it would be most unjust to deprive the husband of all he possessed. Independent of this, the moral aspect of the proposition, the legal obstacle is a serious one. This contract of leasing the common property is one that these spouses might probably enter into with a bettering of themselves. By it the husband deprives himself for the term of the control which the statute gives him of the common property, while the wife, as to the lease, would hold that as her separate estate. This is in my opinion the position they would occupy as to each other in regard to this property, whatever might be their relations as to others. If this plaintiff, holding under an accepted lease, can now wholly ignore that relation and depose her husband, also her lessee, of his entire estate in the leased premises, she can accomplish what no other persons who occupy this relation of landlord and tenant can do. If, upon the other hand, the husband can procure his wife to accept a lease of the common property, and then, giving her good cause for a divorce, can by means of this lease deprive her of part of the relief which she would otherwise obtain—*i. e.*, a division of the common property—a manifest injustice would be done.

In the present case the defendant has not appeared, and is not represented, and the Court is compelled to protect his interest without aid or suggestion upon his behalf.

The judgment will be that plaintiff take the divorce asked for upon the ground of desertion; that as to the real estate, the same be equally divided, by commissioners or otherwise, under the direction of the Court, into two equal parcels, according to value; that of one of these parcels plaintiff be adjudged the sole and several owner, and that the same be set over to her accordingly; that of the other moiety defendant be adjudged the owner in severalty, subject to the lease of defendant to plaintiff in said estate; that the personal property of said community be divided and set apart in like manner, and that out of the part or proceeds of said personal property set apart to defendant the costs of this suit and of the partition and apportionment herein directed be paid and satisfied. Let findings and such decrees, interlocutory and final, as may be necessary to carry out the order here made, be prepared and submitted.

D. N. BURNS vs. SANTA CLARA VALLEY MILL AND LUMBER CO.

OPINION DELIVERED DECEMBER, 1883.

This action was brought by plaintiff against defendant for an accounting of certain shingle transactions in which plaintiff and defendant were co-partners. The case was referred to an accountant and he reported a small balance, $29.25, in favor of plaintiff. Plaintiff now attacks this report of the referee, and claims that matters which should have been passed upon were omitted, and that property of the co-partnership was not accounted for before the referee or disposed of in his report, and urges other objections. Upon these matters the whole case was reconsidered by the Court. It was made to appear that all the property of the co-partnership has been disposed of in the dealings of the firm, and the only question that was seriously insisted upon was that the defendant had failed to account for some thousands of shingles received at the yard upon which the shingle company stored its shingles.

By the proofs in this case it appears that plaintiff and defendant were engaged for some seven years in dealing in shingles, plaintiff manufacturing them in the mountains, and the defendant, as its part of the business, taking charge of the storage and sale of these shingles in San Jose. The account of these shingles was kept by a clerk paid for these services by the shingle company. During this period there were received and stored at the yard of the company several millions of shingles. The books of the company account for all of these by actual sales except about one thousand bunches, less than a half of one per cent. of the shingles received. It is not shown by plaintiff that there has been any misappropriation of these shingles by the defendant, or that it is in any way cognizant of the cause of this deficiency. Upon the part of the defendant it is shown that the shingles were in an exposed lot and liable to be stolen, and, in fact, it was observed that some of them had been stolen, and in consequence of this discovery a special watch was for a time maintained at the yard. No other explanation is given by either party of the cause of the deficit than that above stated. Upon this showing it is claimed for plaintiff that the defendant is to be held accountable for this loss, upon what theory or for what reason is not apparent. The relation of these parties is not that of bailor and bailee, but that of partners. The shingles in the yard were as much in the possession and charge of one partner as of the other. The circumstances under which one partner is held accountable to another for partnership property are very restricted. No such accountability exists as a general rule. It is where it is clearly shown that the partner sought to be charged has appropriated to his individual uses the company property, or when his negligence has been of so gross a character that an irresistible inference of fraud is presented. This is not the case now considered. Neither misappropriation nor fraud are here shown. The only fact relied upon by plaintiff is that, upon the account of shingles received and shingles sold, a certain number are wanting. The rule here insisted upon by plaintiff would, in effect, render the active member of every mercantile co-partnership individually liable for any deficit in the goods of the firm which might appear from an inventory. This, as already stated, would apply to co-partners, as between themselves, the very stringent rule and rigorous obligations which apply between bailor and bailee, a rule which has no application in this class of cases.

The report of W. B. Hardy, Esq., the referee, is approved and affirmed. The Court orders that plaintiff do have judgment upon said accounting for $29.25, as a full accounting and settlement of all the affairs of said company. Were there any assets of this co-partnership they would be applied to the costs of this suit, but, as appears from the testimony, there are none; and it also appears that the co-partnership was, in fact and effect, long since closed and dissolved, and that this controversy is one which has arisen between the individual members of the company long subsequent to its practical ending and dissolution. The only proper order that can be made in such a case, as to costs, is that which places these parties in the same practical position, as far as possible, that they would have held had this accounting taken place during the existence of the co-partnership and while there were assets of the company available for that purpose. Each party will pay his own costs. Findings and a decree may be prepared and submitted by either party.

NOTE.—This opinion is interesting from the extra-judicial circumstances which surrounded it. The plaintiff, Burns, was an old man of gigantic stature, reckless and obstinate in his opinions. He firmly believed, and on many occasions stated, that the defendants had robbed him. He posted a printed notice to this effect at the corner of First and Santa Clara Streets, the most crowded thoroughfares of San Jose, and for several days paraded the neighborhood with a navy revolver in his belt with the avowed purpose of shooting anyone who should remove it. He appeared to be a monomaniac on this subject, and accused the defendants, their attorneys, and even his own attorneys and referees, of being in a conspiracy to defraud him. It was feared by some that he might carry his feeling so far as to commit violence on the person of the Judge who rendered a decision adverse to his interests. This feeling, although well known to Judge Belden, never caused him to hesitate in his duty, and he never was included in Burns' catalogue of conspirators. In fact Burns told the writer that Judge Belden's decision could not have been different under the facts as presented to him, and he could not hold him responsible for the perjury of the defendants.

SENTENCE OF GEORGE LANGLEY.

DELIVERED DECEMBER, 1883.

The jury in this case have found the fact and have adjudged the penalty. There is nothing left, therefore, for the Court but to pronounce the judgment which the statute itself declares. In so doing, however, I deem it proper that whatever of admonition, of warning, of example, your act and your unfortunate position presents, should be laid before the community, not only that they may understand the justice of your own sentence, but that it may stand as a warning to all in the future.

The facts of the case, as asserted by yourself, are substantially these: That you had been heretofore in the employ of Fischer and had difficulty in obtaining a settlement with him; that you insisted upon it that he should pay you that which you claimed was your due; that he refused, perhaps improperly, and that your own poverty and the necessity of your family made you persistent in your demands. In all this there was nothing wrong. It was your right to demand of him that which was your due, the wages which you had earned; it was a duty which you doubtless owed to your family that you should collect for their maintenance the fruits of your own labor. I am prepared to concede that the refusal of Fischer was wrong, and that he refused in a manner which was offensive and annoying. It may well be that the urgencies of your family justified you in being persistent in your demands. In all this you were probably in the right; in all this the law would have upheld you. Had you commenced a civil action against Fischer for settlement, you could have doubtless recovered your wages. The money which was your due would have come to your hands unstained by blood and without crime. This was not the course which you saw fit to pursue. You went to his place, and, if the testimony of the witness McGrayan be credited, you declared that if Fischer didn't settle with you, he would wish he had—you would settle him. You went there armed with a pistol. The evidence in the case strongly showed that Fischer made no movement, and if he said or did anything it probably was the language of petulance and vexation, perhaps of insolence, but that he made any movement, that he made any hostile demonstration upon you, I do not believe. The finding of the jury is that he made no such attempt. The facts of the case show that even had he made an attempt you could have withdrawn in safety without difficulty or peril to yourself to where witnesses could have seen all that occurred and could have interposed had interposition been needed. All this is your part of the case, the facts as testified to by yourself. This your position, this the position of Fischer, you fired at him a shot which stands wholly unjustified. The representation you make that you thought he was drawing a pistol is contradicted by the fact that, observed when living and examined when dead, no weapon was found upon him; his coat was off and no pistol was seen, though one would have been clearly apparent had he carried one with him.

You shot him, and for this you are called here to answer, with the term of life imprisonment in the Penitentiary. To a man of your former good character, your present appearance, your family surroundings, a penalty of this kind is a very painful one for a Court to inflict; it is a very painful one for a citizen to suffer. But the law is inexorable, and that in your case it may seem perhaps a hardship and too severe is more by comparison with other verdicts than the circumstances of your own offence. It is because juries in other cases have hesitated and doubted and have sought to temper justice with a mistaken mercy that so many crimes cumber the calendar of our Courts and so many men sink into bloody graves.

I here again denounce, as I have often before with whatever earnestness I can express denounced, this practice of men who, expecting a controversy and believing that an altercation must follow, arm themselves with deadly weapons for the purpose of such meeting. The man that under such circumstances takes with him a pistol prepares for a homicide, if he does not purpose a murder; and when a word of petulance, an act of violence, or an equivocal movement or motion invites to an exhibition of weapons, a citizen is generally slain. I further denounce the notion generally prevalent that for every assault, however trifling, for every indignity, however slight, a man may resent by slaying his assailant. That he may arm for such a purpose and then carry it into fatal execution has no warrant in law, humanity, or in morals; and when the community shall understand that the law gives ample redress for all such wrongs we shall have fewer such lamentable occurrences. It is well to know that there is no disgrace to a man to be assailed by a ruffian, to be beaten by a bully. The wrong and the outrage is upon the assailant, and the sympathy of the community is always and justly with the sufferer. The law gives to him civil remedies for his injury, and punishes the crime of the aggressor, but does not permit him to take the life of such assailant; it punishes the assailant and measures the punishment according to his wrong-doing. It fines, mulcts him in damages, and it gives to the wronged citizen ample redress.

The popular idea that a party assaulted may slay his assailant is quite often a fatal mistake. This right exists only when absolutely essential to the life of the party exercising it, and he may take the life of another when imperative exigency requires it to preserve his own life, and under no other circumstances. This was not your case. Your life was not in danger. That you had been wronged by this man we may admit; that he should have paid you may be conceded; that he should have answered civilly to your demands no one will question. But that you should have shot him for this refusal, that you should have slain him for this simple denial, has neither excuse of law nor justification in morals; and this was but another instance of a homicide from the senseless, the wicked practice of the citizen who, expecting a mere controversy, arms himself with a murderous weapon to engage in it. If a man desires to discuss a difficulty with his fellow-citizen, let him chance such weapons as Nature furnishes him with, and if he meet with wrong, oppression, abuse, or assault, let him look to the law, and it will punish his aggressor as such misconduct shall warrant. But for a mere assault it will neither take the life of the aggressor nor will it excuse the citizen who shall presume to do so. By your act of violence this man is taken from his family, from his wife and his children, and from the community, and laid away in the grave; and for yourself there remains a scarcely less fearful fate—that of imprisonment for life. There remains for me but to repeat the judgment of the jury, a judgment which, if it seem stern, I trust will stand as a wholesome admonition to all who may hear or who will heed, that he who arms himself with a murderous weapon to enter upon an altercation but invites to a bloody deed of which he may reasonably expect to be either the victim or the perpetrator. Stern as is the law, severe as may appear your punishment, I trust it may stand a wholesome admonition for all time to come.

The judgment of the Court is that you be imprisoned in the State Prison for the term of your natural life.

PEOPLE vs. BEAL, REED, DORMER AND KERR.

DECISION RENDERED JANUARY, 1884.

At the late session of the Grand Jury of this county the several defendants above named were indicted for the crime of gaming, alleged to have been by them committed in carrying on and conducting a game of faro. None of these defendants were held to answer at the time of the impanelling of the Grand Jury, and all objections that would have been availed of by a party in custody and brought before the Grand Jury are expressly saved and secured to these defendants by the Code. They now all and several appear, and, making the following objections, move that the indictments herein found be quashed and set aside.

First.—That the Grand Jury was not drawn and organized as by law required, and in this respect show that of the twenty-five names drawn under the direction of the Court, one of the parties whose name was so drawn was not upon the last assessment roll of the county.

Second.—That the name of Gorham P. Beans appears upon one of the lists kept at the time of the drawing, and that no such name appears upon the assessment roll.

Third.—That the names of the witnesses called, sworn and examined before the Grand Jury in the investigation of these cases, were not by the Grand Jury endorsed upon said indictments or at the foot thereof, as by the Code required.

These objections will be considered in the order above stated. The juror whose name did not appear upon the assessment roll stated that fact upon his examination, and before the jury was sworn, and was thereupon by the Court excused. A Grand Jury is invalidated by incompetent persons taken upon it, and not by their exclusion from it. The argument that the name of a disqualified person drawn upon a jury, but not taken, vitiates that panel, would with equal propriety maintain that all the names in the jury box were vitiated by the presence there of one disqualified person or name. This contention is without merit.

The second objection is equally untenable. The name of Gorham P. Beal is found upon the assessment roll. The name of Gorham P. Beal was regularly drawn from the jury box, and this was the name which was written upon two of the lists then taken of the drawing and upon the one served by the Sheriff. In answer to the citation, Gorham P. Beal appeared and acted as a Grand Juror. The fact that upon one of the three lists made at the drawing the clerk by inadvertence wrote this name "Gorham P. Beans," in no way affected either the identity or the qualification of the juror, nor would it, in my opinion, had all the lists repeated the same error. It was the name of a qualified juror that went into the box that was drawn from it, and that in response to this drawing appeared and served as a Grand Juror. This complied with every essential requirement of the statute, and the keeping of lists and the like was but directory, to the exact performance of which neither the statute nor the right of the parties require that any consequences shall attach.

The third and last objection is of a much more serious character. Upon this testimony has been taken and these facts are shown: That while the Grand Jury were considering these gambling offences they summoned before them E. A. McClintock, a member of the police force of this city; that he was duly sworn and examined by the Grand Jury as a witness; that upon such examination he testified as follows: That "he had upon many occasions heard many of the parties whose names are endorsed upon these indictments as witnesses examined before the Grand Jury speak of the amounts they had won and lost at the faro games kept by these defendants, and that he had upon many occasions seen these same parties at different hours of the night going to and coming from the rooms in which these games were played." The name of this witness is not in any way endorsed upon either of these indictments. It is insisted, however, upon the part of the State, that as to the testimony given by this witness as to the avowals of these players, this was mere hearsay, and that as the evidence was objectionable upon that ground, the Grand Jury was justified in not endorsing the name of this witness. To this proposition I cannot assent. It is not the legality or effect of the testimony given that determines whether a party is a witness, but the fact that he is sworn and examined. A party might be well convicted of perjury for testifying that he knew nothing of the matter upon which he was questioned. If the argument of the counsel for the people be sound, it follows that a Grand Jury might find a good indictment for the gravest of offences, yet the testimony upon which they had acted might be of such a character and so presented before them as to excuse upon their part any reference to the witnesses examined —in short, the more worthless the evidence and therefore groundless their accusation, the more ample their excuse for not naming their witnesses and informing the citizen who were his accusers. This is not, however, the only or the most conclusive answer to this objection. The witness, McClintock, did testify to material facts of his own knowledge, that is, that the parties who testified to playing these games were frequently seen by him passing to and from the places where these games were conducted. This may be a circumstance of importance—it was certainly a material fact. It tended to corroborate these witnesses as to the statement of their presence at that place at that time—a fact which defendants might have disputed. Such testimony would have met, what is a frequent mode of defence, that a witness was not and could not have been at the place he describes, by the proof that he was in the vicinity and could easily and readily have been there. There can be no question as to the materiality of the testimony of this witness. The effect of the failure to endorse his name upon the indictment is declared by the statute in language too plain and explicit to admit of doubt, or to even call for judicial construction. Says the Code:

"The indictment must be set aside by the Court in which the defendant is arraigned, upon his motion, in either of the following cases: * * * Second, where the names of the witnesses examined before the Grand Jury are not inserted at the foot of the indictment or endorsed thereon." (Sec. 995 P. C.) Explicit and self-construing as is this provision, the section has been considered in our Supreme Court. In People vs. Freeland, 6 Cal., 96, the Court considers the purpose as well as effect of this provision, and says: "It was that the party charged with a crime before this secret tribunal may be informed as to who are his accusers." In the People vs. Swain, 22 Cal., 249, and the People vs. Lopez, 26 Cal., 112, the same question was again presented, and it was held by the Court that this was a valid objection to an indictment, and this is the manner in which this objection must be availed of. To this objection under this provision of the Code and these decisions of the Supreme Court there is no answer. The indictments against these defendants must be set aside and it is so ordered. The objection here sustained is to an apparent clerical omission on the part of the Grand Jury. It in no way involves the sufficiency of the indictment in other respects.

I think these cases should be submitted to another Grand Jury, and it is ordered that each and all of these cases be re-submitted to the next regular Grand Jury of the County of Santa Clara. The fact that another Grand Jury is not likely to be convened in several months is of less importance in view of the facilities with which criminal prosecutions may be inaugurated by complaint before a magistrate followed by information in the higher Court. That this method is free from many of the technicalities with which the action of the Grand Jury is environed and embarrassed, and that any error or defect either of form or substance can be promptly and easily corrected, should, to all concerned in the enforcement of our criminal laws, commend as the preferable mode this procedure by information.

LAS ANIMAS PARTITION.

DECISION RENDERED JANUARY, 1884.

This controversy is between Henry Miller and Jacob L. Sargent, and arises from the following facts: Jacob L. Sargent and his three brothers are and for many years have been co-partners dealing in lands. While thus jointly concerned, upon the 17th of December, 1859, they purchased from one Jose Cannalles his possessory interest to 160 acres, located within the boundaries of the Las Animas Rancho. The deed was taken in the name of Jacob L. and James P. Sargent. It described the tract by metes and bounds, was dated as of the 17th day of December, 1859, and acknowledged by Cannalles upon the 23rd day of December, 1859, and recorded June 11th, 1860. At the time of this purchase Cannalles was in the exclusive possession of the tract, but he had no title derived in any way through the Las Animas grant or patent. After this purchase the Sargents went into the possession of this tract and remained in the exclusive occupation of same until February 13, 1862, when a quit-claim deed to the same was executed to Henry Miller and he entered upon the occupation of this tract. At the date last named (February 13, 1862) the Sargents had no other interest in the "Las Animas" than that thus acquired by their purchase from Cannalles. Upon the 4th day of April, 1862, the Sargents purchased the undivided one-sixteenth of the Las Animas Ranch from one of the heirs. Upon the part of Miller and against Jacob L. Sargent it is now claimed that the deed dated February 13th, 1862, from the Sargents to Miller, was not executed or delivered by Jacob L. Sargent until the 27th of June, 1862, and after the purchase of the one-sixteenth made in April, 1862, and that this latter execution and delivery by Jacob L. passed not only the interest he acquired from Cannalles, but also his interest in the one-sixteenth purchased from the Las Animas heirs, to the extent of 160 acres. The question thus presented is one of fact, largely determinable, as will be seen, by conclusions drawn from legal presumptions rather than from actual proofs. The deed itself is in the usual form of a quit-claim deed. In the opening it recites: "This indenture, made the 13th day of February, 1862, between Jacob L. Sargent, of the County of San Joaquin, and James P. Sargent, of the County of Santa Clara, parties of the first part, and Henry Miller, of the second part, witnesseth, etc. * * " Then follows in the usual form a quit-claim of the tract described by metes and bounds, and concludes: "In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"James P. Sargent,
"Jacob L. Sargent.

"Signed, sealed and delivered in the presence of Henry Haight by James P. Sargent."

Following this is a regular acknowledgment made by James P. Sargent only, and certified by Henry Haight, Notary Public. Following this is a regular acknowledgment purporting to have been made by Jacob L. Sargent, June 27th, 1862, before H. Doyle, a Notary Public of San Joaquin County. The original deed is not produced, but a certified copy is put in evidence by the plaintiff. Assuming this to be an accurate copy, it is evident that the original deed was prepared by using an ordinary printed form, and it is quite apparent that the blanks were filled up by a layman and not by a lawyer or regular conveyancer. These are all the matters disclosed by the deed itself, and which throw any light upon the question to be determined. The oral evidence is brief, and consists of the testimony of Jacob L. and James P. Sargent—both called and examined as witnesses upon the part of the plaintiff. Jacob L. Sargent testifies that he was of the impression that he drafted the deed himself and that it was signed about the time the trade was agreed upon, but a few days later; that he thought this was done at Gilroy or near there; that the interest they were conveying was that acquired from Cannalles and some other, and that this was so understood by Miller at the time. He was certain that he did not himself deliver this deed; that he was of the impression that he signed the deed at a day anterior to its acknowledgment and during the winter; that he lived in San Joaquin County at the time and had no doubt of the fact of acknowledgment as set forth. This witness was farther questioned as to what he would infer from the dates appearing upon this instrument. He did not pretend that his memory was in any way refreshed by the consideration of these dates, or that his former impressions were in any way modified or changed thereby. These inferences upon his part were such as any other person might draw from similar suggestions, and as the Court will endeavor to draw for itself, from these data.

James P. Sargent testified that he left the deed with Haight, Mr. Miller's lawyer, at the time he signed and acknowledged it; "that he supposed Jacob was then in San Joaquin County, that was where he lived;" and to the question, "It was afterwards sent to him?" replied, "I suppose likely, he signed it;" and to the question, "And signed it afterward?" replied, "He signed it afterward, I see." All these replies are apparently the inferences which the witness drew from an examination of the deed, and not from either independent or aided recollections of the actual circumstances. From this meagre showing the Court has to determine the important question whether the deed from "Jacob L. Sargent" was so delivered as to transfer 160 acres of the valuable interest acquired April 4, 1862, or nothing, as now represented by the purchase from Cannalles. It is conceded that the legal presumption is that this deed was delivered as of the date it bears (February 13, 1862), but it is insisted that the testimony of Jacob L. Sargent shows that it was not then delivered and therefore removes that presumption. Admitting (which I do not) that Sargent's evidence does accomplish this, the same testimony, with more of detail and of confidence, indicates that it was signed and delivered as of some day anterior to the acknowledgment—though it does not give the date. If it be conceded that plaintiff's witness has overthrown the presumption which followed from the date, it must also be admitted that he has overthrown any that arose from the subsequent acknowledgment; and the Court is left with these facts established and nothing farther, that Jacob L. Sargent signed this deed some time after the 13th of February, 1862, and before the 27th of June, 1862, but whether before or after the 4th of April, 1862, the material date, is not shown. I am of opinion that the oral testimony tends to show that the deed was in fact executed by Jacob L. Sargent before the month of April, 1862. He says that he was of the impression that he wrote the deed himself, and, as already stated, the instrument has intrinsic evidence of having been filled up by a layman; that it was about the time of the trade and during the winter. Neither of these conditions would agree with an execution in June. Further, it would have been gross negligence for the party who paid $1,600 for this interest to have let the conveyance he was to receive remain unsigned by one of the two grantors, and the longer this delay the greater the negligence, while neither the same presumption nor the same consequences would follow from a mere failure to procure an acknowledgment. Sargent must have known of the purchase made in April, and may be assumed to know what effect such a deed would have had upon this interest. Had he signed before April he would have had no such consideration before him. Signing afterward, he might well be expected to have known and considered it. If it be said that this suggestion assumes the very question in controversy, that may be admitted, and still the circumstance be permitted to stand as furnishing some evidence in the case. When the act itself, the very fact, is the matter in dispute, its inherent probability or improbability, as judged by the canons of ordinary experience and observation, is always one of the factors in the inquiry, and is always and properly urged in argument. That a given course, a certain act, conforms to or is opposed to considerations of policy, to the dictates of ordinary prudence, or to the instinct of self-preservation and the like, is so well understood to aid in determining the very existence of the fact itself, that in some of these instances it has attained the legal force of a presumption, and is estimated accordingly.

In the present case, that Jacob L. Sargent, having negotiated a sale to Miller of the one-fourth of a squatter's claim of 160 acres for $1,600, should without further negotiation or consideration, in the same instrument, transfer the one-sixty-fourth of 21,000 acres, is unreasonable, improbable, and incredible. If he signed this deed before the 4th of April his action was consistent and reasonable; if after, it was improvident and unreasonable in the highest degree. Without further discussing the oral testimony, I proceed to briefly examine the presumptions arising from the instrument itself. If these were to be estimated by themselves, there can be no question that this deed would be held to have been delivered as of the recited date of its execution, February 13th. This is undoubtedly the important date. It was from this that the instrument took effect as a conveyance, that the title passed. The subsequent acknowledgment gave no other or larger right as against the grantor, but merely entitled the paper to record. Further, both these dates can be given full effect for the purpose they recite without conflict, for it well may, and very often does, occur that deeds are fully executed and delivered, and then acknowledged months or even years after.

It is, however, insisted for the plaintiff that when the presumption which attaches to the date is overthrown, the burden of proof shifts to the defendant to show when in fact the deed was delivered. If the burden does shift in such a case, it does not upon the mere removal of a legal presumption. This deed is the proffer of the plaintiff—his muniment of title. Upon him the law casts the duty of making good all that is essential to its validity, to its sufficiency as evidence. In so doing it comes to his aid with certain presumptions; with these he can rest; or, if he sees fit to assail them, he may do so. That he successfully assails a given presumption does no more than to overthrow that presumption; it does not establish any other fact, nor does it cast upon his opponent the duty of establishing any fact set at large by this successful attack. It is still his evidence, his means of proof, the paper upon which he must rely, of whose history he is assumed to be cognizant, whose discrepancies he must explain, whose imperfections he must supply. If the plaintiff's position be well taken, we have the case that a party may introduce a document—the very foundation of his own asserted right—falsify some recital contained in it, and then require an adversary, who was not a party to the contract, and had neither knowledge nor means of knowing of this defect, to make good this discrepancy. In my opinion a party does not shift the burden of proof upon his adversary by simply falsifying his own muniment of title. He may discredit a date, or a fact, but if he rely upon another as the foundation for a right, such further or other fact is part of his case, to be established by a preponderance of proof, or he must fail. In my opinion, plaintiff has not met this onus. He may have disturbed, perhaps pulled down; he has not rebuilt. It is by what he erects, and not by what he ruins, that his claim is to be established.

In my judgment the controlling presumption arising from the dates of this instrument is with the defendant, and favors the proposition that this deed was in fact executed by both the Sargents in February, 1862. That the weight of the oral testimony strongly tends to establish that if not then executed and delivered, it was so executed at a date anterior to the month of April, 1862. I may add that the evidence in this case leaves no question whatever that Sargent and Miller fully understood that the one was selling and the other was buying only the interest acquired from Cannalles, and that this transaction was not by any of the parties understood to include or refer to any other interest of the Sargents in this ranch. As said by the Supreme Court of Massachusetts in passing upon a similar question: "The plain sense and justice of this case require that this construction be given to these acts of the parties." (Fairbanks vs. Metcalf, 8 Mass., 239.)

The plaintiff took nothing acquired of the defendant from the deed of April 4, 1862. Let findings and decree be prepared in accordance with this opinion.

SANTA CLARA CO. vs. GORHAM P. BEAL.

DECISION RENDERED JANUARY, 1884.

One of the many points presented by the demurrer, I understand counsel for plaintiff to concede, is well taken. He asks, however, the judgment of the Court upon other objections presented as a guide in further proceedings. As these objections are made, and have been somewhat discussed, it is proper that they be passed on in the present case. The question of the constitutionality of the County Government Bill was very fully considered by myself in the case of *ex-parte* Pitman. It was then decided that it was constitutional. In this view my associate, Judge Spencer, concurred, and I see no reason for doubting the conclusion thus announced. Until the Supreme Court shall determine otherwise, that decision will be adhered to. Nor do I see any constitutional objections to the "Road Law of the State of California." So far as I can perceive, it is obnoxious to no provision of the Constitution. In my opinion no repugnance is shown between any of the provisions of these two—each and all of the provisions of both can be fully enforced without violating any feature of either. The County Government Act was passed a few days after the road law was enacted. As many of the duties to be performed by the Board of Supervisors under the road law are further provided for in the County Government Bill, both must be read and construed together, and effect, if possible, given to all the provisions of each. In the County Government Bill an ordinance of the Board of Supervisors is carefully defined. It is a proceeding of strict form and much detail, and is wholly unlike the general orders by which the routine business of the Board is performed. It has many special requirements, and is not to take effect till fifteen days after its passage. (Sec. 26.) In the road law it is provided that the Boards of Supervisors must by proper ordinance * * * * * "cause to be surveyed, viewed, laid out, recorded, opened and worked such highways as are in this chapter provided." (Sec. 2643.) Thus the statute in one provision defines an ordinance, and in a direction as to mode, commands that official action of this character shall be by ordinance. In my opinion an ordinance (as contradistinguished from a mere minute order) is an essential preliminary to any action taken by the Board of Supervisors as to the matter of public roads, after the presentation of the petition. The bill does show with sufficient certainty that this road is within the road district named, and in the County of Santa Clara. Upon amendment such apt words of description may be employed in this respect that this objection will not be again suggested. The Act requires "that the viewers shall view the proposed route and notify the resident owners," etc. An averment that the viewers did report to the Board of Supervisors that they had so done is not an allegation that they in fact so did. It is only an assertion that they so *reported*, and may stand, as a fact, with the fact that they had never either viewed or reported. I think this objection well taken. "The Board of Supervisors must order the damages awarded to be set apart in the County Treasury to be paid to the proper owner or claimant." So says Section 2689, and in my opinion this means not only that this shall be so ordered, but that the money shall be actually so set apart, to be paid upon request to the party to whom it was awarded. That this must be so is obvious from the section which follows, and the consequences which this section entails. "If any award of damages is not accepted within ten days from the date of the award, it shall be deemed rejected by the land-owners, and the Board must by order direct the District Attorney of the county, under and as provided in the Act, to institute proceedings against such non-accepting land-owner," etc. * * * (Section 2690.) What is the non-acceptance which must subject the land-owner to the harassment and expense of this litigation? Certainly not that of the fruitless declaration that he is entitled to damages, nor of the order which the Board makes upon the Treasurer. Through this order he has no rights, and over this order he has no control. It is not even a warrant or a certificate of services, or of value which might in due time be paid. It is simply a direction by one body of officials to an officer to set apart a certain fund. If there be no funds to which this order can apply, the party can have no election, but must part with his land or submit to a suit without even having had the opportunity of avoiding it by accepting the money, his due. This cannot be the meaning of this provision. The money which is to compensate for the land must be a segregated amount, set apart and dedicated to this single object, and during the ten days given the party to elect this money must be subject to his order and to his acceptance alone, and chargeable with no other demand. If at the expiration of ten days the money be not accepted it is to be returned to the fund from which it was taken, and an action may then be instituted against the non-accepting land-owner. The fact that this fund, thus segregated and placed, has been for ten days offered to the acceptance of the party is jurisdictional, and the party cannot be sued until for this period these conditions have been proffered to and declined by him—as such facts these would have to be proven at the trial, and the failure to aver their existence is good ground of demurrer. These views are supported by several decisions of our Supreme Court upon similar provisions of the statute, and are as sound in reason, and consonant to justice, as they are impregnable upon authority.

Upon these points above considered, and as stated, the demurrer is sustained; to all other matters, overruled. Ten days to plaintiff to amend.

EMERSON vs. BERGIN.

DECISION RENDERED JANUARY, 1884.

A motion to strike out portions of plaintiff's complaint and also a demurrer to the sufficiency of the complaint are here presented. The paging of the complaint does not sufficiently conform to the motion to strike out to enable me to ascertain to what matters this motion is addressed. Though this doubtless followed from the difference between the original and the copy furnished the defendant's attorney, it is none the less indispensable. The motion to strike out is upon this ground alone denied. The demurrer presents several objections, although upon the argument and in the briefs of counsel but one is urged—this, of the points presented, will be considered. For the defendant it is insisted that the complaint is ambiguous and uncertain, in that it does not clearly appear whether the action is brought for diverting the waters of the stream from their natural channel, or for breaking and interrupting the artificial conduit by which they were conducted to the premises of the plaintiff. In my opinion the plaintiff has set forth with sufficient certainty both these as acts by which he is deprived of water to which he claims he is entitled—by the one act, the erection of the dam so that the water of the stream is prevented from flowing through its natural channel to the lands of the plaintiff, as it otherwise naturally would; by the other, the breaking of the pipes so that the water is prevented from flowing artificially to the lands of plaintiff, as these parties had agreed it should do. It is the wrongful deprivation of this water at this place of which plaintiff complains, and whether these means are the obstruction of natural or artificial conduits is immaterial. That the upper riparian proprietor may consume all the waters of a stream passing through his lands for domestic uses, or in the watering of cattle, to the absolute deprivation of the proprietor below him, is well established; but that he can so deprive him by diverting the waters for purposes of irrigation is not the general rule, and if permissible under the special climatic conditions of this State, must only exist under peculiar and exceptional circumstances. The plaintiff in this case does aver that defendant withdraws this water for purposes of irrigation, and that thereby all of said waters are prevented from flowing in their natural channels to the lands of plaintiff, as they otherwise would do. I am of opinion that in this respect plaintiff does state a cause of action against defendant. The principal proposition discussed, however, was the tenure under which plaintiff claimed the right to maintain his artificial pipe and right of way for the same over the lands of defendant, it being insisted by plaintiff's own bill that it was a mere license from defendant and revocable at his pleasure; while for the plaintiff it is contended that as plaintiff, upon the strength and inducement of this license, had made permanent and expensive improvements, the defendant will not be permitted to revoke the license thus granted and thus acted upon. Upon this point, the decisions of the several States and of different periods in the Courts of the same State are in hopeless conflict. In 43 American Reports, page 193—the Minnesota case—Johnson vs. Shillman is made the leading case, and a very extensive citation of cases upon this point follows in the Reporter's note. In the leading case, not distinguishable in its facts from the case at bar, it was held that where parties, acting upon a mere oral promise, had at large expense erected a dam and mill upon the premises of another, the authority to do so was a mere license, revocable at the pleasure of the owner. The review by the Reporter of the decisions upon this question shows very clearly the strong tendency of the later cases to maintain this doctrine; and many early decisions qualifying this doctrine, or holding the opposite view, are either in terms or in effect overruled. In our own Supreme Court, Potter vs. Mercer, 53 Cal., 667, holds to the same doctrine, and in view of the conflict in the decisions and the tendency of the later cases, indicates very clearly the adhesion of the Court to the later doctrine. To so much of plaintiff's complaint as seeks to recover against defendant by virtue of a license or permission to maintain the conduit in question upon the lands of defendant the demurrer is sustained. To that portion which counts upon the obstruction of the natural watercourse it is overruled. The difficulty presented on the motion to strike out, and the fact that as to the obstruction of the natural channel of this watercourse a good and complete cause of action is stated, independent of the feature as to which the demurrer is sustained, render it somewhat doubtful as to the order which should be now made. Subject to such further correction as may be deemed advisable, the present order will be that the defendant have ten days to answer.

SENTENCE OF DANIEL C. LANE.

DELIVERED JANUARY, 1884.

The considerations so well suggested by your counsel have been already fully considered by the Court. The circumstances with which the very important discretion vested in the Judge in a case of this character is to be guided, can but impress profoundly the officer charged with its exercise. These I have weighed carefully; I trust I shall be found to have estimated them wisely and well. I have from this place upon more than one occasion felt it my duty to call attention to crimes of this character, committed by men situated as you are, and men treating their wives with cruelty and brutality, driving them by their misconduct from their homes that should be to them a refuge and shelter, continuing that persecution in other households and uniting brutality with their cruelty, extending their threats and their assaults to those that stand as protectors of those that these wretched, worthless husbands abandon. For such men I have very little consideration; for that conduct recognize no excuse, no palliation. The fact that such men usually profess a sudden affection for the wives that they uniformally ill-treat, a sudden ebullition of affection for children whom they neglect and to whom they disregard all parental obligations—in these expressions of emotions and sentiment I take no part; I have for them no sympathy. As a rule, I impose upon such criminals a penalty which, if not commensurate with the wrong-doing, is generally enough to indicate my views of the law and the manner in which it should be reprobated. The circumstances of your case are somewhat special. Certain witnesses have testified here, the acquaintances of your boyhood and youth, to your former good character. That testimony comes in every instance with a marked qualification: "A good man if he would not get drunk." I have heard that too often. I hear it upon the streets, and I hear it in the Court and in the community. Good men do not get drunk. The lesson and experience of to-day are but a repetition of that taught by the Great Master: "Ye shall know a tree by its fruits. A good tree cannot bring forth evil fruit, neither can a corrupt tree bring forth good fruit." Good men do not get drunk, they do not ill-treat and abuse their wives. They do not neglect their children; they do not assail helpless and defenseless women. Bad deeds make bad men, and these are bad deeds. Good men do fail and do fall in the battle of life, but they do not fall in the gutter as drunkards, disabled and disgraced by their own vicious practices. They fall as soldiers fall upon the battlefield, struggling and striving manfully, courageously, honestly, against the obstacles that oppose and the difficulties that surround them. By your conduct your long-suffering wife has been made to know that the house that should have been to her a home, a shelter and a refuge, is of all places upon earth the one she must flee from and shun; that you, her husband, to whom of all she should look with affectionate confidence, are of all the one she must most fear and avoid. This is the life you have lived, this is the character you have established, before you have entered your twenty-fourth year. Your career, to this time, has been vicious and bad. It points to a future full of evil unless there be a radical and speedy change. In this case I have received with great deference the recommendation of the jury to mercy. I am inclined to think it has a foundation in fact. I am disposed to believe that you did not intend to murder this helpless woman you assailed. The fact that you stood within a distance of a foot and a half, armed with a weapon of that character, and you failed to wound her, gives some plausibility to your statement that you purposed but to terrify her. The jury were doubtless impressed by that consideration; their recommendation to mercy is probably based upon that fact. Concede it to be so, your purpose was cruel, cowardly and brutal. There were none but helpless women that you thus sought to frighten and terrify, and with a change of but an inch in the direction of the pistol, you might be standing to-day in the shadow of the gallows. You have had a narrow escape from a very fearful crime. Let it be a permanent admonition to you. I have considered the suggestions pressed by your counsel upon the jury. They have with me weight. There are with your name and of your blood three helpless children; that fact should have been of itself alone a guarantee against this conduct, which endangers you and disgraces them. That it has proved fruitless does not prevent the Court, so far as it can, from sheltering them from that disgrace, the evil result of your own misconduct. I am not willing that those guiltless children should share in your disgrace, and be compelled to trace the name of their father, vicious, wretched and worthless though he may be, upon the scroll of the felon. I am willing they shall be spared this shame and this dishonor; but allow me to say to you here, speaking to you as a Judge, the exercise of whose discretion may make you an inmate of the Penitentiary or incarcerate you in the County Jail, let me say to you here, with all the earnestness of which I am capable, that this admonition is the last you will receive from this seat. The quality of mercy may not be strained, but too often drawn upon its fountains may be exhausted. For you they are dry. When this term of imprisonment is ended, if you should appear again in the criminal courts of this county as the persecutor of the woman whose misfortune it is to bear your name, or are allied with, or as the assailant of those with whom she finds the refuge you have denied her, hope for no lenity at the hands of a jury, expect no consideration at the hands of the Court. Go away from these people to whom your association is but a disgrace and a danger, and somewhere else, and under other surroundings and other conditions, attempt while yet you may to retrace your steps and to retrieve your character. In no spirit of unkindness do I say this, but as accepting the responsibility of exercising in mercy a discretion which you scarcely merit.

The judgment of this Court is that you be imprisoned in the County Jail of this county for the term of six months.

HENRY MILLER vs. MASSEY THOMAS ET AL.

DECISION RENDERED APRIL, 1884.

In this case a certain undivided one-sixteenth of the Rancho Las Animas is claimed by Henry Miller through mesne conveyances from one Encarnacion Castro de Arietta. M. de Butron and S. F. Leib, parties defendant, by answer and by cross-complaint assert title in themselves as heirs or grantees of heirs of said Encarnacion, and assert that at the date of the alleged conveyances under which Miller claims said Encarnacion was insane and idiotic, and wholly incapable of executing any valid contract whatever. A brief sketch of the character and career of Encarnacion Castro may aid in the solution of the principal question here involved. Encarnacion Castro was born in the County of Santa Clara about the year 1810. In 1827 she was married to one Arietta, a native of Spain, and bore to him several children. The witnesses who speak of her at this period characterize her as a somewhat rude and reckless person, not very circumspect either as to speech or conduct, and apparently endowed with an exuberant supply of physical spirit and vigor, but in no way lacking in mental capacity. In the year 1829 her husband left her and returned to Spain. All the witnesses speak of this departure as an abandonment, but there is nothing to show that this was a purpose, asserted or intended, when he left, or that he then gave his wife and family to so understand, and it is represented that for a while, at least, he wrote to his wife from Spain. However, whatever was his original intention, he never did return, and soon after his departure all communication between himself and wife ceased, and for over thirty years and to the death of Encarnacion there is no evidence that she or her family heard anything from him.

Encarnacion brought upon herself a severe illness by wading through a swamp; a fever followed, and when she recovered from the fever it was found that she was partially paralysed. By this paralysis the lower limbs and lower portion of the body were almost wholly disabled, and one side and arm were at least partially affected. From the effects of this attack she never recovered, but remained in this disabled condition until her death, which occurred in 1875—about forty years after the original attack. It was while in this condition that she executed the two deeds now brought in question—the first, November 7th, 1850, to S. C. Head, for a consideration of $2,000; the other to John C. Cabanis, February 28, 1858, for a recited consideration of $500. The second deed was apparently intended to cure supposed defects in the first conveyance, as it described the same property and was executed to a party then holding through the Head conveyance. No conveyance was made directly from Encarnacion to Miller, nor is there any evidence that he had any knowledge whatever as to her condition during her lifetime, or before this title passed to himself. The evidence upon the part of the defendants as to the condition, mental and physical, of Encarnacion from 1836 to 1875, the period intermediate to which these conveyances were made, is the testimony of relatives, friends and acquaintances as to her appearance, conduct and condition, as they understood it—the estimate of her by the community, specific acts and matters and the opinions of a medical gentleman upon a hypothetical case submitted to him—while the plaintiff meets this evidence by countervailing testimony of the same general as well as specific character. Very much of this testimony upon both sides is cumulative—the mere repetition by many witnesses of the same general statement. I shall summarize the result without either repeating as to matter, or individualizing as to witnesses. Justo Larios, Cecelia De Larios, Mrs. Pillar Chavarra, Julian Martinez, Vincente Aguila, Guadalupe Castro, James Castro, Julius Martin, D. B. Lillard, Sebastian Arietta, Salalah Butron—each and all testify to having known Encarnacion well—many of them from her childhood, several being her relatives and the members of her immediate family. They detail the matters summarized in the sketch I have given of her life, the causes which led to her disablement. All testify that from the first attack till her death, forty years later, she was wholly disabled in body; that her whole life during this period was passed in a recumbent position upon a bear skin or rawhide, and that she was wholly unable to move herself, but was transported from place to place by some one dragging the hide with her upon it; that during all this time there was no improvement in her condition, physical or mental, but that she was absolutely imbecile and idiotic, and was so regarded by all of her family, as well as by all of her acquaintances and by the community in which she resided, and that this idiocy was as observable from her mere appearance as from her actions and conversation, and could not but have been noticed by any one seeing her. While speaking to details, two or more of these witnesses testify that she could not converse intelligently upon ordinary subjects, or give connected and intelligent answers to the most simple questions; that she was never spoken to upon business affairs nor did she ever refer to them; that she was profane and obscene in her language—so much so that when the Catholic priest visited the house it was necessary to take her from the room; that the children of the family would tease her and annoy her and she would cry like a child; that she could not be taught even to sew, and that when the effort was made she would pass the needle through the cloth at the same place without advancing it at all, and could not be made to do otherwise; that there was a constant flow of saliva from the mouth which she made no effort to restrain or remove; that the boys of the family would put on the vestments of the priest that were left at the house, and that she would salute them as priests and make her confession to them; that as to the ordinary offices of nature she was wholly helpless and required the same attention as an infant, and that she was universally spoken of as "loco" or crazy. This, if these witnesses are to be credited, was this woman's condition for nearly forty years—the very lowest form of an idiocy which could not but have attracted the attention and fixed the recollection of the most superficial observer, and which must have absolutely disqualified her for contracting in any form or for any purpose whatever. The testimony offered by plaintiff will be in like manner here presented.

Mrs. Maria Crane, Samuel Rea, Jacob Doane, Lucinda Robles, Miss Lydia Crane, Miguel Espinoso, Thomas Rea, Mrs. M. Rea, Vincente Castro, Ramon Ortega, Guadalupe Romero, Celestina Gonzales, Ygnacio Ortega, Francisco Palomarco, Samuel Wright, O. J. Wilson, Barney Williams, Father J. Hudson, Rita De Castro, Alexis Godoy, P. Roquette, these witnesses had all known Encarnacion during her lifetime. Many of them had been upon intimate terms with her, seeing her frequently for years after she had become paralysed, and several were her immediate relatives. A number, however, had met her but a few times and at distant intervals. All testify as to her physical disability, but all state that they saw no evidences of mental weakness either in her appearance, actions, or conversation; that they never suspected any mental infirmity, nor did they ever hear among the neighbors and acquaintances that this was her condition. They further testify that the word "loco" as here used would not mean an idiot or insane person, but one wild, reckless, erratic, or perhaps lewd—that to express idiocy or mental weakness the phrase "ida del sentido" would be employed. Julius Martin, who had been called for defendants, was also called for plaintiff. He testified that in 1857 he was present when Encarnacion acknowledged a deed before Judge Hester, then Judge of the Third Judicial District; that one Wm. Johnson, a resident of Gilroy, acted as interpreter; that Mr. Johnson was a fine Spanish scholar, and a man of the very highest repute in that community. In 1858 she was brought to the office of Jacob Doan, a Justice of the Peace, to acknowledge the deed to Cabanis. The Justice testifies that he understood enough of Spanish to know that she was answering with all apparent intelligence and understanding the questions asked her, and that he did not suspect any mental deficiency upon her part. Other witnesses testify that she prepared and cooked her own food; that she was often sewing, making dresses for children, and worked upon them as any woman might do; that when spoken to of her husband she would weep and exhibit so much distress that the subject would be avoided; that when she was selling her land in 1850 she conducted the negotiations herself, insisted upon and actually received a larger price than other members of the family did for the same interest, and that when this fact was stated as an objection to the price she demanded, she replied that "the men had sacrificed their property to get money to gamble and dance with, and that her land was worth what she asked and she must have it"; that she often complained of the neglect of her relatives; that years after, upon two or more occasions, when parties spoke to her of buying her interest in this property, she stated that she had already sold it and had none left; that when one of her daughters contracted an illicit relation, she expressed the utmost indignation, "became perfectly furious and acted like a crazy woman;" as the witness states it, said "it was an outrage and disgrace to the family," and wished the witness to drive the man who was debauching her daughter from the place. Father Hudson, the Catholic priest of the parish, was examined. Much of his testimony was excluded upon the ground that it necessarily included privileged communications upon which he could not be cross-examined. He was, however, permitted to and did testify that he visited her several times in his personal capacity; that she always saluted him respectfully, and by his pastoral title, and recognized the purpose that brought him there; and that she received at his hands, with all apparent appreciation and devotion, the sacrament he administered; that from what he saw and observed of her outside the confessional he never suspected her to be either idiotic or imbecile. The opinion he might have derived through her confession to him as a priest he was not permitted to speak from.

Dr. Thorne was called by the defendants. He had no acquaintance with this woman and his opinion was predicated entirely upon a hypothetical case stated. When he was examined the evidence was but partially disclosed, and the case as I now understand it was not the one presented to the doctor and upon which his opinion was based. Dr. Thorne understood the case as one of severe and permanent paralysis from an effusion of blood upon the brain and a blood clot resulting therefrom. His very full and lucid answers and explanations assume this to have been the origin and accompaniment of this physical impairment. This case, however, was not the paralysis which follows from the rupture of a blood vessel in the brain, always inaugurated by a sudden shock and a certain degree of insensibility; that such an injury, involving directly the organ through which the mind acts, would be followed by a pronounced mental impairment, is more than probable, and this was the case the doctor assumed, and to which he replied. Had it been stated that this paralysis had followed upon a severe illness; that it particularly affected the lower limbs long submerged in cold water; that it did not manifest itself by a sudden shock, but followed immediately upon this peculiar exposure, it is no more than justice to the expert to assume that to conditions so unlike those assumed a very different answer would have been returned. It is a fact of ordinary understanding that paralysis in many of its forms is but a derangement of the nervous organization, and in its immediate and often ultimate effects is limited to a special organ —that when the nerves of the spine are involved the lower limbs are often devoid of all sensation while the rest of the body and the mind remains unimpaired. History is replete with such instances. Carnot, one of the dreaded Triumvirate that ruled France during the Reign of Terror, was wholly incapable of locomotion, while in our own day Thad. Stevens, half paralysed, won and maintained the title of the Great American Commoner and ruled with undisputed sway the House of Representatives of our nation. These are but two of a host of similar cases of historic celebrity— instances in which partial paralysis has been found co-existent with the very highest degree of mental capacity and intellectual vigor. In the less conspicuous walks of life similar instances without number are within the observation of all. From the matters as they are of common observation, the Court will take notice that mental impairment does not always or usually follow from paralysis.

The fact that this woman often wept is conceded, and it is insisted that this is a circumstance strongly indicative of imbecility. I do not so estimate this fact. Tears are not always or often a proof of mental weakness—they much oftener accompany nervous affections and overwrought sensibilities than idiocy or imbecility. That this unfortunate woman had abundant cause for tears is more than apparent. Decrepit and helpless, abandoned by her husband and neglected by her relatives, a burden to all others and to herself as well, subjected to the persecutions of rude, ill-governed children, the measure of whose annoyance may be estimated by the sacrilegious imposture they were permitted to practise upon her—she would have been more than a stoic, and less than a woman, had she not wept, and often tears of the bitterest anguish. Could she have considered her situation with tearless eyes it might well have been urged that this was indeed the insensibility of idiocy; that the mind that could contemplate unmoved this hapless, hopeless wreck must be itself a ruin, and that the palsy that held her limbs in its cruel grasp had frozen within her all the springs of human sensibility and emotion, and benumbed to the very verge of consciousness the intellect itself. In these tears I find but the welling up of the bitter waters from a mind fully conscious and keenly sensitive to its own surroundings.

To the other propositions in evidence and heretofore summarized, the testimony is in hopeless conflict. To the character of the witnesses I do not deem it necessary to advert. Upon the general proposition of the appearance and conduct of this woman, the estimate in which she was held by the community, the preponderance of numbers is largely with the plaintiff. That many of the witnesses of plaintiff had seen this woman but a few times, or at distant intervals, does not greatly detract from the value of their opinions, for in this case, upon the theory of the defendants as stated by these witnesses, this was not insanity with occasional or possible lucid intervals. The case they present is one of absolute idiocy—utter imbecility, unbroken by the most furtive gleam of intelligence. Against such an asserted condition, the single observations of credible witnesses can but be of weight. Much stress was laid in the argument upon certain discrepancies in the testimony of witnesses in matters of dates. To such contradictions I attach very little importance. It is a well recognized fact that in no matter of evidence do so many honest mistakes occur as in that of dates, and that, too, with the best informed and most intelligent. That persons of the class and station of most of these witnesses should be often wrong in their chronology was to be expected, and but little importance has been given to it. Restating some of the special facts presented by the evidence, it is incredible that a Justice of the Peace would have taken and certified the acknowledgment of the idiot described by defendants' witnesses, or that a man of the character of Mr. Johnson would have lent himself as interpreter to such a person, for such a purpose, or that a person of Judge Hester's character and position should have performed a similar office for an apparent imbecile, when he might have been called upon within a week to stamp with his judicial condemnation the very act to which he had given his judicial sanction. No reason is suggested, none can be imagined, why these parties, disinterested and indifferent as they apparently were, should have countenanced an act thus shameless and shocking; every consideration of propriety, decency and duty combine to render it impossible. Against the statement that she never transacted business, we have the shrewd bargain by which she secured a higher price for her land than did her brothers and sisters for theirs, and her full appreciation of the fact that she had once sold it and could not sell it again; to the assertions that she was unable to assist herself in the slightest degree, that she made her own clothes and did her own cooking; that she was not suffered to remain in the presence of the priest, that she received him upon all occasions and with all apparent intelligence as her spiritual adviser, and that he did not even suspect any mental infirmity; while her indignation over her daughter's misconduct exhibits a moral sensibility not always shown by those of her class. Other reasons might be suggested properly deducible from the evidence and the positions of these parties, but to present them would extend this opinion to unwarrantable length.

In dealing with the testimony in this case I have pursued no novel methods, nor have I walked without illustrious guides. Said Sir John Nichol in summing up the results of a long experience in cases of this character:

"The evidence of this class of cases is almost always contradictory, especially as to the opinions of witnesses; and besides this, many other sources of discrepancy are common to all cases of this description. If the Court, therefore, on questions of capacity, is accustomed to rely but little upon such evidence so far as it is that of mere experience, but to form its own judgment from the acts and conduct of the parties at the time, it becomes it to do so more particularly when much of the evidence consists not merely of opinions delivered long subsequently to the transactions which they profess to have suggested them, but upon loose recollections, too, and after repeated discussions of the subject matter with interested parties." (Shelford on Lunacy, 277-8.) In this class of cases the burden of proof is upon the party asserting the incapacity. In my judgment the preponderance of evidence shows this woman to have been of ordinary capacity and capable of executing the contract in question. This conclusion renders it unnecessary for me to consider the effect of such a conveyance to a purchaser in good faith and for full value where he cannot be restored to his former position.

Other questions are presented, several involving the execution of the deeds themselves as matters of form, others her right to execute at all without the joinder of her husband. I am of the opinion that the defects suggested are immaterial, and further, that as to those affecting the acknowledgment, that they are cured, if such aid were needed, by the legislation upon that subject. To the argument that her husband must unite with her in the deed, it may be replied that the same law which required this concurrence upon the part of the husband creates the presumption of his death after his absence, unheard from, of several years. Arietta left his family in 1829. When the Head deed was executed, over twenty years had elapsed since he had been heard from, and nearly thirty when the deed was made to Cabanis. Whatever may be the moral probabilities of his death, I think the common law presumption of death from so long an unexplained absence should be applied. It further appears that this interest has been made the subject of certain probate proceedings as representing the assets of the estate of Cabanis, and that sales under the order of the Probate Court have been made of these interests. It is further insisted that as the heirs of this estate have not been made parties, they may hereafter take advantage of certain irregularities in these sales, and that as these objections may affect the validity of this partition proceeding, any of the parties to this partition may present this objection, and insist upon its present determination. These defendants pretend to no interest through this estate—their claim is that nothing passed to this party. In my opinion they should not be heard upon this question. The estate in question is represented by attorneys and has filed an answer. If each of the several hundred parties to this proceeding is permitted to litigate all the possible and conjectural claims which may exist as to these lands, and should the Court invite or permit this general inquiry, these proceedings must become interminable. In Gates vs. Salmon, 46 Cal., 374, a similar question was before the Supreme Court, and said the Court: "It is sufficient to say that the appellants above named are not interested in the question presented by that point, and will not be affected by its decision. This question only concerns those who claim under this grantor."

Most of the questions here urged affect only this estate—none of them any interest asserted by these defendants. These objections they may never urge, or if asserted it may be found that they are concluded by these proceedings or are in themselves groundless. The principal, in my opinion the only question, properly before the Court is as to the capacity of this woman to make these conveyances. This I have fully considered, and its determination in my judgment disposes of all that can with either safety or propriety be now passed upon. The finding will be that Encarnacion was of sufficient capacity to execute the deeds in question and these were by her executed and were legal and valid conveyances; that by them all her interest in said Rancho Las Animas passed to the grantees named, and that no interest or estate remained in her or in her heirs.

Judgment that defendants take nothing by their cross-complaint, and that plaintiff have judgment against said defendants and for costs of this proceeding.

COTTLE vs. SPITZER.

DECISION RENDERED MAY, 1884.

I entirely agree in the views presented and conclusions reached by my associate, Judge Spencer. These opinions were prepared without previous consultation. To the reasons of my associate I subjoin my own.

The rule as to the construction both of constitutional provisions and of statutes was well summarized by our Supreme Court in People vs. Eddy. Said the Court: "The word property as used in the Constitution is to be construed in the ordinary and popular sense, and this is the general rule for the interpretation of constitutions and statutes, unless the context shows that the words are used in a technical or in some arbitrary sense." (42 Cal., 536.) For the Court to apply any other rule upon its views either of public policy or of popular interest would be a mere judicial usurpation of legislative power. What, then, was understood by the Convention which framed our present Constitution, and by the people who ratified it, by the term "growing crops"?

By lexicographers, crop is defined as "That which is gathered from a single field, or of a single kind of grain or fruit, or in a single season; especially the valuable product of what is planted in the earth; fruit; harvest." (Webster.) "That which is gathered as fruit, the harvest." (Worcester.) In popular parlance the word has the same universal meaning, and the phrases "cropping contracts," "interest in crops," "harvesting crops," and the like are used in the precise sense in which they are defined in dictionaries. This phrase has also received a practical and general construction in the action of public officials. In 1851 the Legislature attempted, with other classes of property, to exempt "growing crops" from taxation, and from that time until the decision in People vs. McCreery, in 1867, this exemption was conceded by the Assessors. During all this period it is a matter of universal knowledge that this exemption was only asserted and allowed for annual and immature crops, and it was never pretended that trees or vines of perennial growth came within it. Again, in 1855, a statute provided "that no person for mining purposes shall destroy or injure any growing crops of grain or garden vegetables growing upon the mineral lands of this State, nor undermine or injure any house, building, improvements, or fruit trees standing upon any mineral land and the property of another."

In this provision a "growing crop" was not understood by the Legislature to mean growing trees, or we have a useless repetition of phrases. Again, in 1859, and while the general exemption as to "growing crops" was in practical effect, it was enacted:

"No tax of any nature whatever shall be hereafter assessed or collected from the owners, managers, or agents of newly planted vines or olives, on account of the same, until the vine shall have attained the age of four years and the olive seven years."

A clearer indication that these were not then understood as included in the term "growing crops," already exempted, cannot be conceived, while by a familiar rule of construction the special designation of "grapes" and "olives" as exempt is the legislative declaration that all trees not so specified are to be taxed. In 1868 the Supreme Court, following the former decision of People vs. McCreery, and making special application of the principles of that case, held that growing crops, the annual product of the soil, could not be exempted by the Legislature from taxation. (People vs. Gerke, 35 Cal., 677.)

Again, in 1878, a statute providing for a lien upon growing crops enacted:

"The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor." An unmistakable recognition of the fact that the Legislature then understood by a "crop" that which in ordinary husbandry was to be severed from the land when utilized. These are but a few of very many statutory recognitions of the meaning of this phrase. They clearly establish that, in the legislative mind, as well as in judicial decisions, the term had the same meaning as in lexicographics and in the popular understanding, and this was the general understanding of this phrase when the Convention assembled which framed the present Constitution. That body consisted of representatives of every class and vocation—of farmers who had benefited by the former exemption, and orchardists and vine-growers who had been denied it—of legislators who had assisted in framing these laws—of lawyers who had discussed them—of judges who had construed and applied them. Such a body could not have been ignorant of the universal interpretation which this phrase had so long received from every branch of the State Government and in the popular understanding. Before this body thus composed, and thus informed, came the question of the exemption of "growing crops." The members of this Convention could not but have been aware of the growing importance of the vine and fruit interest of the State. It was reported to them that fifty millions of capital was then employed in grape culture alone, and yet in all the debates upon this question, both upon the part of those who favored and of those who opposed this exemption, constant reference is made to a crop to be sown and harvested within the same year, and not even a suggestion that trees or vines of perennial growth were referred to.

It is indeed strange that those thus familiar with this phrase, well knowing, as they must have done, the restricted application it had before received from every quarter, interested, too, in enlarging its scope and meaning, should thus reproduce these exact words, without addition or explanation, intending or expecting that they could receive any larger or other meaning in the future than had been ascribed to them in the past. This conduct admits of but one explanation—that they then employed these words as usage, law and legislation had already defined them.

Eight months after the adoption of this Constitution the Legislature was in session. It was fresh from the people and from the discussions through which the Constitution had been ratified. In the Senate were six, in the Assembly two, representatives who had been members of the Constitutional Convention.

Thus assisting in the interpretation of their own recent work, this first Legislature enacted:

"The term improvements includes all fruit, nut-bearing or ornamental trees and vines not of natural growth."

"The term growing crops includes only those crops which require an annual planting or sowing, or an annual harvesting."

These were expressly enacted as terms of definition in the first Revenue Act passed after the adoption of the Constitution. It but repeated all former definitions, and a more explicit and unequivocal interpretation of the phrase incorporated in the Constitution cannot be imagined.

It is, however, insisted that upon considerations of public policy this phrase should receive a broad or enlarged interpretation. Such is not the rule which the statute prescribes for the guidance of Courts. Says the Code:

"In the construction of a statute or instrument the office of the Judge is simply to ascertain and declare what is in terms, or in substance, contained therein; not to insert what has been omitted, or to omit what has been inserted. * * * " (Section 158, Code Civil Procedure.)

Nor do I understand that these special exemptions, creating, as they do, manifest inequality as between the citizens, are to be extended by implication, or beyond their clear and express meaning. Said our own Supreme Court, speaking by Rhodes, J.:

"It is impossible to conceive of any law which is more imperatively required by the principles of good government and the just rules of political economy to be equal and uniform than a revenue law. That the burdens of taxation should rest equally upon all property within the State ought to be axiomatic, not only in theory but in practice." (People vs. Eddy, 43 Cal., 339.)

To secure this equality was one of the controlling causes for the change in our State Constitution. It was an expression of the general discontent with exemptions established by judicial decisions. It was in this spirit the Convention deliberated, and that there might be equality in the burdens of government that the people ratified.

To again extend through the Courts and by implication these exemptions, is to defeat the clearly expressed will of the people declared in their Constitution, and reinstate the original grievance. It was insisted upon the argument that the fruit-growers would not be satisfied with an exemption accorded to the farmer and denied to themselves. That objection must be urged to the Constitution which so provides, and not to the Court, whose single duty it is to declare what is too plainly expressed to admit of doubt or to call for construction. Laws are understood as the expression of the will of all the people, and are not to be either enlarged or restricted in their operation to conform to the wishes or in the interests of any particular class. Were the inquiry made, it might be found that the discontent with this exemption extended to other classes of taxpayers; nor would that discontent be allayed should the Courts determine that orchards whose yearly crop produced from $200 to $400 per acre to the owners were to have the trees from which such a revenue was derived valued no higher than the worthless brush which they supplanted. Such a decision, if it did not cause discontent, might at least excite surprise upon the part of less fortunate and less favored taxpayers. Beyond all this there is a result which may follow from any mistaken interference with the Assessor to which attention may well be called. It is understood that in taxing trees the Assessor is following the instructions of the State Board of Equalization, issued to the Assessors of all the counties. It may be assumed that unless there be some judicial interference these directions will be followed by the several Assessors. In the discharge of their duties the State Board will apply one common rule to all the counties, and will pay no attention to the cause of any local undervaluation, whether brought about by the mistake of the Assessor or of the Court. In fact, to attempt to conform their duties to the varying decisions of the fifty-two counties of this State would paralyse the functions of this Board and wholly destroy its utility. If any class of property shall, in any county, be undervalued, the State Board cannot correct this mistake by raising the value of this particular property, but must raise the entire assessment roll of the county. This was expressly so decided in Wells, Fargo & Co. vs. the State Board of Equalization (56 Cal., 197), and is the course certain to be pursued. The result will be that if the other property within the county shall be properly valued by the Assessor, and this interest placed too low, the State Board will raise the entire assessment of all the property, and every taxpayer will have his assessment raised above its just valuation, the exact percentage that the State Board determines fruit trees to be below their proper value. Several counties of this State—among them Santa Clara County—had last year a very instructive and most unsatisfactory experience in this matter, and a Court may well hesitate at a course which may invite or compel a repetition of this experience. In my opinion, in all cases in which the revenue of the State is involved, and the question is one subject to revision by the State Board, the proceeding should be inaugurated in the Supreme Court. A decision from that tribunal would be accepted by the State Board as authority, and the Assessors of all the counties would conform their actions to such decision. Thus, no inequalities between the several counties would be found, calling for this arbitrary, severe, and often most inequitable and oppressive interference upon the part of the State Board.

The writ should be denied.

CHAPTER XIV.

LAS ANIMAS.

MILLER vs. MASSEY THOMAS ET AL.

DECISION RENDERED JULY, 1884.

IN January, 1850, Maria Lugarda Castro de Doak was the owner of an undivided one-sixteenth of the Las Animas Rancho, by her acquired by inheritance from her deceased father. To that interest, or to portions of it, four wholly independent and conflicting claims are asserted:

First.—That of Henry Miller.
Second.—Pablo and Isaac Doak, represented by Christian Wentz, guardian.
Third.—Heirs of D. E. Blythe, deceased.
Fourth.—J. L. N. Shepherd.

The claims of the several parties will be briefly considered: Upon the 21st of February, 1853, Maria Lugarda C. de Doak, with the concurrence of her husband, executed to one S. C. Head a written contract of sale, by which, for a valuable consideration she contracted to sell and convey to said Head a certain tract of two hundred acres of said Las Animas Rancho. In the contract said tract was specifically described by metes and bounds. At the time of the sale the grantor was in the exclusive occupation of said specific tract, having the same inclosed, and from and after the sale Head continued in the exclusive occupation of this tract until the 20th of April, 1859, when he conveyed the same by deed to Henry Miller. Miller has ever since said last date remained in the exclusive occupation of the same, this tract with other parcels constituting the so-called "Bloomfield Farm."

Upon the 20th day of August, 1853, Mrs. Doak, her husband concurring, executed to D. E. Blythe a deed of grant, bargain and sale, of a specific tract of this rancho, containing three hundred acres. Upon the 2nd of November, 1853, she in like manner conveyed to said Blythe a further tract of ten acres. Upon the 12th of December, 1853, she in like manner conveyed to said Blythe a further tract of 58 14-100 acres. In all these deeds her husband united. In each the conveyance was by grant, bargain and sale, of a specific tract described by metes and bounds; of each and all the said Maria Doak was in the exclusive occupation at the time of the sale, and her grantee in like manner entered into and maintained the exclusive occupation of the tracts so purchased. Upon the 22nd of May, 1857, Maria Doak and her husband united in and executed to D. E. Blythe a written instrument and agreement. This agreement referred to the three conveyances to Blythe above set forth, and then recited:

"And whereas also, the said several deeds of conveyance herein named from said first parties to said second parties as above set forth, to the several parcels or pieces of land above set forth, contain covenants of seizure on the part of the first parties and also covenants of warranty; and whereas it is thought that the deeds so made do not convey a perfect title to said several tracts of land, and that there is an undivided interest in others in and to said lands; and whereas the said parties are desirous to and bound to complete and perfect the title as attempted to be conveyed to the said D. E. Blythe as above set forth, now it is understood and agreed by and between the parties hereto, that if the said first parties shall and do well and truly make or cause to be made conveyances to the said second party, whereby the title in fee simple without any incumbrance and indefeasible shall be vested in the said second party of, in, and to the said three several tracts and parcels of land hereinbefore set forth, which said conveyances shall be procured within two years from this date upon the reasonable demand of the said second party, and shall perfect the whole title to said land in and to the said second party—then, and in that event, the above and foregoing conveyance shall be and become void—otherwise to remain in full force and virtue. * * * "

Upon the 27th day of December, 1859, Blythe conveyed to Miller his interest in the three parcels above set forth, and Miller then took, ever since has, and still does maintain the exclusive occupation of the same. In the conveyance so made, Blythe did not in terms undertake to convey to Miller the undivided interest conveyed by the Doak deed of May 22, 1857.

Upon the part of the Blythe heirs it is now insisted that by this deed from Mrs. Doak to Blythe, of May 22, 1857, an undivided interest in the general ranch in fee simple absolute passed to Blythe, and as this was not transferred in terms to Miller, it remained in Blythe and is now in these heirs. In my opinion this was not the character nor this the effect of this instrument. In the instrument itself there was a condition recited upon the happening of which the conveyance was to be void, and this would of itself prevent its operating as an absolute conveyance. But beyond this, it is apparent that this was intended as a mere security to Blythe. It was the Doaks charging their undivided interest in this ranch with a lien to make good their attempted conveyance of a specific parcel. If they, thereafter, acting for themselves, or the law acting for them, secured this title to Blythe, or to his grantees, the purpose of this deed was effectual and the security was avoided. If for any reason this as a conveyance is still in force, it is for the benefit of Miller, the owner of that which it was given to secure. It either passed with the principal thing it was to secure or it absolutely lapsed. To hold that this, a mere incident, remained in Blythe as an absolute conveyance, is alike against principle and precedent. Whatever may be the effect of this instrument as to others, that it remained a right in any way enforceable by Blythe after his conveyance to Miller I do not imagine. As this is the only claim asserted upon the part of the Blythe heirs, these views, if correct, dispose of that contention.

For the Doak heirs it is claimed that they have, by inheritance, an interest in the general ranch and also some interest in the special localities conveyed to Head and Blythe by Mrs. Doak, their mother. That they have no interest in these specific tracts is too plain for discussion. (Salmon vs. Gates, 35 Cal.; Salmon vs. Gates, 46 Cal.) Mrs. Doak undertook to sell all of these parcels; and by this act estopped herself and all who derived title through her by any subsequent act upon her part from saying she had not so conveyed. Independent of this rule of estoppel, she could convey one-sixteenth of this special parcel, and this she has undertaken to do. She had no further interest in this particular parcel —and would not even have been a proper party to a partition suit of that specific tract. It is impossible to understand how any farther interest in that tract could have passed from her either by deed or through inheritance. Whether these Doak heirs have any interest in that part of the ranch not included in these special locations depends upon the consideration of these facts:

Upon the 21st of November, 1857, Maria Doak and her husband united in an instrument to one John Yontz. By this they created Yontz their attorney, with power to sell and convey their interest in this ranch, but did not in terms empower him to mortgage. In the same instrument it was further provided, "That the said parties do grant, bargain, sell and convey to said Yontz, our attorney aforesaid, said property, and every part thereof, so as to enable him to make good and sufficient conveyances thereof."

Acting under this authority, Yontz made a number of conveyances of specific parcels of said ranch, and upon the 4th day of March, 1858, executed to Frederick Hall a mortgage of all his interest in said ranch to secure a loan of $1,000. In December, 1861, Hall brought suit to foreclose this mortgage, obtained in due time and form a decree, and on February 22nd, 1862, this interest was sold by the Sheriff, and Hall became the purchaser. No redemption was effected, and in due time Hall received the Sheriff's deed for the premises sold, and upon the 12th of February, 1867, he conveyed that interest to J. L. N. Shepherd, who still holds the same. It may be well doubted whether the power from Doak to Yontz, as a mere power, authorized the execution of the mortgage, but this instrument in equally explicit terms undertook to grant and convey, although this was recited to be given to better enable the party to convey. I do not think these general and broader terms are to be so restricted. Certainly full effect is not given to this paper unless these apt words of conveyance be held to pass the title. In making the mortgage, Yontz was apparently acting under the conveyance, and not under the power, and in foreclosing his mortgage, Hall so treated his action. I shall so construe it. If this view is correct, all that was in the Doaks passed to Yontz by this instrument, and either by his conveyance of special tracts, or his general mortgage to Hall, all passed from him by these deeds and these foreclosure proceedings, and nothing remains in the Doak heirs. The question as to what Shepherd takes by virtue of Hall's foreclosure proceedings and deed depends upon the effect to be given to the several deeds by special locations made in the first instance by Mrs. Doak to Head and to Blythe, and now held by Miller, and those afterwards held by Yontz. I have examined this question with much care. The rule is, to my appreciation, obscure. The language of the decisions is not always reconcilable.

Without attempting to reconcile conflicting decisions, or to indicate any other or broader rule than the exact necessities of the present case require, I understand that one tenant in common may, by deed purporting to convey the whole of a specific tract by metes and bounds, absolutely transfer all of his own interest in that particular tract; that upon partition the Court will set apart the interest of such grantor so as to include the special location, and so make good his attempted transfer, if the same can be done without detriment to the original co-tenants of the grantor; that upon such allotment such grantor will be estopped to deny that the whole of the tract so set apart to him did not pass by his deed to his former grantee; that this duty of the Court to thus set apart and allot to the original grantor such part of the general tract shall make good his specific conveyances, becomes and is a vested right in the grantee upon the execution of the deed to him, and can be neither diminished nor impaired by any subsequent conveyance, special or general, upon the part of his grantors, but such subsequent grantees will be held to take notice of former deeds of their grantor, of the equitable allotment that a Court will make upon partition, and of the estoppel against their grantor, and through him to them, to question or to deny that such conveyances passed the entire title to this special tract.

This, as a rule, it will be understood, applies exclusively to successive grantees from one common grantor. Other original tenants in common cannot be estopped or in any way affected by transactions to which they are not parties. Applying this rule to the present case, if the undivided interest of the Doaks in the whole ranch at the date of the Head and the Blythe deeds was equal in value, quantity and quality considered, to the parcels of land the grantor then undertook to convey, that general interest will be so allotted as to make good the entire title to the grantee of these special parcels. If it be less, it must be ratably apportioned. If it be more, the residue of that interest will make good the succeeding deeds of Mrs. Doak or Yontz, or be applied to the Hall mortgage and through it to Shepherd.

It is, however, further insisted on behalf of Shepherd that, when he purchased from Hall, he had no notice of the contract of sale from Doak to Head, and that he is entitled to the interest originally owned by Mrs. Doak in this two hundred acre tract, the argument being that as Miller was rightfully in possession of this tract under other interests held by him in the ranch, Shepherd was neither apprised of, nor was he required to ascertain, by what tenure he maintained this possession, or through what conveyance he asserted it. In support of this contention, the rule which denies to one tenant in common any adverse right as against his co-tenant, from exclusive occupancy, is relied upon.

In my opinion neither the rules deducible from adverse possession nor notice have any application to this class of cases. As counsel well says: "Upon a tract of land of this magnitude, with several thousand persons in occupation, holding by every variety of claim, how can a purchaser be expected, or required, to ascertain the manifold modes, legal or equitable, by which the multitude of claimants hold?" In my opinion he cannot be required to make such interminable and probably fruitless inquiry. Neither will he be permitted to shut his eyes to the fact that all these conditions might well exist and affect or wholly intercept the title he is seeking to acquire.

In the present case Miller was in the actual and exclusive possesion of this tract and had it inclosed. It was at least practicable for Shepherd to have inquired as to this claim thus evidenced. It was not possible for Miller to have anticipated or known every one who might be proposing to deal with his grantor, and advise them as to the conditions under which they were purchasing. In my opinion a party attempting to deal with property circumstanced as was this takes it *cum onere*, and if his grantor have parted with all his titles before conveying to him—whether the former grantees be in possession or not—he will only take as his grantor could have taken, and the fact of notice, actual or constructive, will have no place in the equation by which his rights are to be worked out; any other rule would prove utterly impracticable, and would result in interminable complications and hardships.

As already stated, Head was in the notorious and exclusive occupancy of this tract, and that fact was known to Shepherd when he purchased. Less than this would, in my judgment, have maintained Miller's right to this location.

The findings and interlocutory decree in this case will be prepared in conformity with these views and submitted to the Court.

EMERSON vs. BERGIN ET AL.

DECISION RENDERED AUGUST, 1884.

This action is brought by plaintiff to enjoin the defendants from obstructing the waters of a stream, and thereby diverting the same from the premises of the plaintiff, and also to recover damages for former diversions. The facts are these:

The plaintiff and defendants are the owners of tracts of lands through which flows a small stream of water. The defendants are the upper proprietors, and their lands are about one and a half miles above those of the plaintiff. The stream in question is for much of the year a small rivulet, the quantity of water varying materially, not only with the seasons of the year, but equally so with the varying rainfall of successive years. In ordinary seasons sufficient water flows in this stream to answer the requirements of both these parties, while in seasons much below the average as to rainfall, during a portion of the year sufficient water does not flow to supply the wants, or even to reach the lands, of the plaintiff. The plaintiff is a farmer cultivating a large tract of land, and also having upon the same a considerable number of horses, cattle and sheep. The number of animals so maintained is not disproportioned to the proper and profitable use of plaintiff's land. There is no other practicable mode of supplying water to this farm and to this stock, and to plaintiff's household, than from this stream.

The defendants are farmers and vine-growers. They employ upon their place ten or a dozen horses and cattle. These animals are not disproportioned to the farm and the farming operations of the defendants. There is no other practicable or convenient mode of supplying these animals and the household of defendants with water than by the use of this stream. Where the stream passes through the land of defendants it flows in a narrow and steep channel and is densely shaded by a growth of small trees. Upon either side the banks are very steep, and some forty or fifty feet in height. The bed of the creek is apparently a shallow stratum of gravel deposited by the stream itself. After leaving the premises of defendants the banks are but little shaded; the channel is wider and less steep, and the gravel forming the bed or bottom is apparently much deeper. The dwelling-house and barns of the defendants are upon a bench or plateau about 150 feet from the stream and about sixty feet above its bed. In order to supply water to their house and outbuildings, the defendants have laid a tight earthen pipe from a point in the stream about three hundred yards above their house to a point about opposite the same. At the lower end this earthen pipe connects with an iron pipe, and this with a hydraulic ram. From this ram a three-quarter pipe discharges the water raised by the ram into a tank at the house of defendants. All the water that this ram can or does raise is about one thousand gallons each twenty-four hours. The ram stands about six or eight feet from the channel of the stream. All the water not raised to defendants' tank is discharged directly into the stream without waste or loss.

With the water so raised defendants supply their house, and also water their cattle. They also have a small flower garden by the house with a few square yards of grass. This is also watered from this tank, all the water so used for all purposes not exceeding 1,000 gallons per day. For the purpose of deflecting the water into the head of their pipe the defendants placed across the channel of the stream a plank about ten feet long and ten inches wide. This obstruction was no more than was required to turn the water in this pipe. It raised the water in a shallow pool of a few inches in depth, from three to five or six feet in width and twenty or thirty feet in length. The pool thus formed is densely shaded. As already stated, in exceptional seasons and for a short time the waters of this stream do not reach the lands of the plaintiff, and this was the case during a portion of the summer of 1883. The rights of parties situated and circumstanced as are these to the waters of this stream are well settled by a uniform and unbroken line of adjudications and authorities. The upper riparian proprietor has the right to consume for domestic purposes, and watering cattle, all the waters of the stream that pass over his land, without regard to the requirements or necessities of the less fortunate proprietor below him. This proposition I do not understand to be disputed; it certainly cannot be successfully questioned.

It is, however, insisted that the use of this water for the flower garden of defendants is not within this rule; also that the pool formed by the defendants' obstruction causes a material and improper loss from increased evaporation, and, further, that the water, as raised by this obstruction, is brought in contact with loose and permeable strata of gravel, through which it infiltrates, and is thus wholly diverted from the bed of the stream and does not again return to it. That the defendants are not using an unreasonable quantity of water must be conceded; 1,000 gallons per diem for household purposes and the requirements of a quite extensive farm is certainly not extravagant. Nor is the manner in which it is so utilized in any way objectionable. The defendants have the same right to take the water to their cattle that they have to drive the cattle to the water—to raise it to their house by a ram, that they have to transport it in barrels or buckets. They have the right to use this water to a certain extent. How they may avail themselves of this right is not the question. It is only when they abuse the right that those injuriously affected may complain. As already stated, the actual amount used does not exceed 1,000 gallons per day. The conditions under which hydraulic rams work are well understood, and it is well known that seven or eight times as much water must be returned by the ram to the stream as is raised to the height of defendants' tank.

The very small flower garden of defendants probably requires and receives not over one or two hundred gallons per day. I see nothing more unreasonable in this than if the same amount were expended in washing a carriage, or any other purpose of cleanliness or comfort. The few shrubs and flowers with which taste and refinement would adorn a home may well claim as part of the domestic necessities the scanty allotment of water that shall keep them in existence.

It is claimed that the enlarged pool caused by defendants' obstruction creates a wasteful degree of evaporation. I have stated the dimensions of this pool, and the fact that it is completely shaded by trees. In my opinion the increased evaporation is quite insignificant. It may be added that were not this obstruction placed there for the purposes of this ram, but if the defendants watered their cattle at the stream, and did they take the water required for household purposes in the same way, some such obstruction would be needed and would be employed to so collect the waters that they could be readily dipped up, and so that cattle could conveniently drink. Obstructions of this character are in universal use upon every stream and at every spring. Their convenience is apparent, their use not unreasonable or improper. The claim that these waters are materially diminished by this obstruction, raising them to the level of loose and porous beds of gravel, if correct as matter of fact, might well furnish good cause of complaint, for a party has no more right to divert waters from their natural channel through subterranean beds of gravel than he would have to carry them off by open ditches upon the surface.

In this case the question is not with the law or the right, but with the fact. The banks of this stream upon the margin of the pool caused by defendants' obstruction are of ordinary alluvial soil, alternating with strata of clay. Some of these strata are mingled with gravel, but in no respect do these appear as a quicksand or as liable to any extensive infiltration of water. It is not necessary, however, to inquire as to the character of the banks of this stream, for the dam of defendants nowhere raises the water above the gravel and sand which constitutes its bed, and any loss which may follow from this cause is to be looked for in the bed of this channel. It is equally apparent from the conformation of the country that there can be no sensible diminution from this cause. The immediate banks are very steep, and from thirty to fifty feet high. The surrounding country, for a considerable distance, is all much higher than the bed of this stream.

Infiltration from every quarter must of necessity be into, and not from, this stream, unless we are to assume at this point a reversal of all the laws of hydraulics.

Again, if, as contended for, the structure of this soil is thus favorable to infiltration, why is not this stream wholly absorbed and diverted before it reaches this particular point? It certainly passes over such a bed for a mile or more, in many places much more directly in contact with the banks than at this place, and yet its volume is in all this distance constantly augmenting. The fact is, the infiltration is upon every hand, and of absolute necessity, from the higher banks into the lower stream. I see no reason for supposing that there is any diminution of water from this cause. I find many reasons for believing that result impossible. Upon the other hand, there are apparent causes for the disappearance of this stream. All the witnesses testify that when the stream is low, while a very appreciable quantity, far more than is taken by defendants, flows below the land of defendants, it yet sinks into and is lost in the larger body of sand and gravel which there forms the bed of the stream. This is a result quite in keeping with the character of this stream and the nature of its bed, and is equally so of most of those streams which maintain themselves in the hills, but disappear when they reach a sandy valley. Instances of this are to be seen on every hand, and very conspicuous ones are presented in the neighboring State of Nevada, where large rivers, representing the entire watershed of the eastern slopes of the Sierras, have no other outlet than the sands and marshes of the desert, and sink from sight as effectively in these as though swallowed up in the ocean.

In my judgment it is by conditions like these, and not by the acts of defendants, that plaintiff has been deprived of these waters. As these causes were neither called into being nor set in motion by the acts of defendants, they cannot be held responsible for their consequences. They have but used their own as they rightfully might, and the plaintiff can neither compel them to relinquish that right nor to share with him the disadvantages and detriment of his situation.

Judgment that plaintiff take nothing by his bill; that the injunction be dissolved and that the defendants go hence with their costs.

PEOPLE vs. JEAN DARAS.

DECISION RENDERED AUGUST, 1884.

The defendant was convicted in the City Justice Court of San Jose of violating an ordinance of the city prohibiting the leasing of houses or premises for the purposes of houses of ill-fame. He was sentenced to pay a fine of $30, and "in default of the payment of such fine to be imprisoned in the City Prison of the City of San Jose, County of Santa Clara, for a term not exceeding 30 days." From this judgment the defendant appeals upon a statement of the case settled by the Justice. The principal point relied upon by the defendant is, that the offense created by the ordinance, and of which defendant was convicted, is also provided for by the general statute of the State, and the assertion is that where the statute deals with that particular offense the prosecution must be under the statute, and that municipal authorities cannot legislate further by ordinance upon the same subject. In support of this argument the decision of Judge Deady, of the United States District Court of Oregon, in the case of Lee Tong, is relied upon, and Section 11, Article XI., of the State Constitution, is also cited in support of this proposition. The charter of the City of San Jose, in a general enumeration of powers conferred, provides: The city "may provide by ordinance for the prohibition and suppression of gambling houses and houses of ill-fame, all indecent and immoral amusements and exhibitions," etc. * * * Acting under this provision of the Charter, the Common Council in due form by ordinance enacted: "No person shall keep or maintain, or become an inmate of, or be a visitor to, nor shall any person in any manner contribute to the support of, any disorderly house or house of ill-fame, and no person shall knowingly let or underlet, or transfer the possession of, any house or lands or other place for use by any person for any of the aforesaid purposes." (Section 14 of Ordinance.) That part of the section of the statute relating to the same subject reads as follows: "And any person who lets any apartment or tenement, knowing that it is to be used for the purposes of assignation or prostitution, is guilty of a misdemeanor." (Sec. 316 Penal Code.)

The constitutional provision quoted reads as follows: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." (Section 11, Article XI.)

If I correctly understand the position of counsel for defendant, that this ordinance is void and ineffectual as being a mere repetition of a statute of the State upon the same subject, it is not perceived how an ordinance can be at the same time a repetition of and in conflict with the State law. The constitutional objection is not, in my opinion, well taken.

In the Lee Tong case cited by defendant, the Court holds upon this point as follows: "A grant of power to a city to suppress gaming and gambling houses includes the power to suppress gaming, but when the crime of gaming is defined and the punishment therefor prescribed by the law of the State, the city is not authorized to suppress any game not prohibited by such law, nor to punish any person playing thereat, but is confined to the use of such means as may be within its limits." The learned Judge who rendered this decision states that the only case directly in point that has been cited was The City, etc., vs. Bruzo, 11 Iowa, 399, in which it was held that "a general grant of power to the City Council to 'suppress gambling' did not authorize it to pass an ordinance providing for the punishment of a person keeping a gambling device." Says the Court: "The City Council cannot punish that which they are only authorized to suppress, under the general powers." With all respect for the distinguished Court which pronounced this opinion, it may well be inquired, what did the Legislature propose to confer when it gave the power to "suppress"? Was it assumed that the moral sense of this community was such that all would yield obedience to a prohibition which carried no penalties—was armed with no terrors? It was made the duty of the Common Council to suppress gambling houses and houses of ill-fame. I am quite unable to see how this could be complied with unless penalties and punishments were provided for infractors.

It may be safely asserted that half the penal enactments of either the Legislature or the municipalities within the State are prefaced by the formula: "An Act or an ordinance to suppress or prevent," and all that followed has been deemed the means suitable to such suppression or prevention. I see no reason why, in a grant of power to suppress, there is not of necessity implied the power to punish. I am not surprised that in this construction the Iowa Court stands alone. In his decision of the case the learned Judge says: "The Council cannot suppress a game that the general law has not prohibited. Its power to suppress gaming must be understood as only applicable to games which the State has made illegal." With all respect, it may be inquired what is the occasion of conferring these particular powers upon municipalities if, after all, they can only do exactly what the general statute without such power authorizes to be done? What benefit is to flow from this local legislation, if it can only repeat as an exact echo the voice of the statute? Further than this, if this be sound as a rule, what becomes of that mass of local legislation generally addressed to considerations of decency, decorum, health and the like, exercised under the same authority, but with regard to which the statute is silent? It certainly appears to me that this reasoning must result in the following conclusions:

If the ordinance undertakes to deal with a subject already provided for by statute, it is effectual; and if it attempts to legislate against acts not prohibited by the statute, its action is void. If these views are correct, it is not perceived what power the City Council has to deal in any way with offenses by ordinance. Farther than this, when the Charter of the city was enacted, March 17, 1874, the Penal Code, in which this offense is also punished, had been in force since January 1, 1873, and yet in this later Charter the Legislature which created alike the corporation and declared the crime authorized the corporation to prohibit and suppress houses of this character.

I have thus fully considered this question in the light of the two cases relied upon and of the State legislation. Independent of these, I think the decided weight of authority is against the views expressed *in re* Lee Tong. The cases are collated in Dillon on "Municipal Corporations" and Cooley on "Constitutional Limitations," and the weight of authority seems to be that when the municipal corporation deals by ordinance with an offense already created by statute, the jurisdiction to proceed either under the statute or the ordinance is co-ordinate, and the better opinion seems to be that the one first acquiring jurisdiction of the party will have exclusive control of the case, and its judgment will be a bar to any attempt to further prosecute under the other authority. I am of opinion that there was authority in the Council to enact the ordinance in question, and that the defendant was properly proceeded against thereunder. The other objections made at the argument have been often determined adversely to the position taken by this defendant, and call for no further consideration.

BERNAL vs. BERNAL.

DECISION RENDERED AUGUST, 1884.

This action is brought by plaintiff to compel the re-conveyance by defendant of certain property conveyed to the defendant by Jose A. Bernal, now deceased, the brother of plaintiff. This re-conveyance is sought upon the following grounds:

First.—That said Jose A. Bernal was, at the time of making these conveyances, January 17, 1882, of weak and feeble mind and not capable of so contracting.

Second.—That undue and improper influence was exerted upon the part of defendant in procuring from said Jose A. said conveyance.

The facts of this case are stated in the findings herewith filed. They will be summarized for the purposes of this opinion. In the month of April, 1878, Jose J. Bernal died testate. His estate he bequeathed in equal portions to his two sons, Jose A. and Daniel F. Bernal. He appointed his brother, Ygnacio, the present defendant, his executor. Jose A. Bernal was born in 1856; Daniel was born in 1860. Ygnacio caused said will to be probated, qualified regularly under it as executor, and entered upon the administration of said trust. Said administration was finally closed, the estate distributed, and the administrator discharged upon the 18th day of November, 1881. Some time in the year 1878, and shortly after the death of their father, the two sons left the former residence of their father and went to live, Jose with the defendant and Daniel with his aunt, Mrs. Gulnac.

Jose so went to his uncle's without any request or solicitation upon the part of the latter. He was made welcome and was treated by his uncle as a member of his family. From about the time of the death of his father Jose A. Bernal was in delicate health, having symptoms of consumption. He was at all times of sound mind and of ordinary intelligence, appreciation and independence of character. In the month of January, 1882, the two brothers, Jose and Daniel, caused a survey to be made of the land they had received by inheritance from their father and made an amicable partition of the tract. The whole tract contained 145 acres, and by the deeds exchanged by the parties in this partition Jose A. received about 74 acres. About the first of January, 1882, Jose A. Bernal proposed to his uncle that he would sell to him this tract of land (74 acres) and what personal property he had for $1,000. Ygnacio replied that he had better see his brother about it and sell it to him. Jose replied that he wished to sell it to him, Ygnacio, for many kindnesses bestowed upon him and his father's family by Ygnacio, and that as to his brother, he had never got along pleasantly with him and did not want him to have this property. Two weeks later Jose A. Bernal renewed the subject, and insisted upon it, and himself and Ygnacio repaired to the law office of Judge Archer. Judge Archer had been the legal adviser of all these parties, and called the attention of Jose A. to the nature and extent of the transaction, and inquired whether he fully understood it, to which Jose A. replied that he did and wished to carry it out as stated.

Upon this Judge Archer drew a deed of the 74 acres of land, and also a bill of sale of certain personal property. Both were signed by Jose A. Bernal and delivered to Ygnacio. The only valuable consideration paid by Ygnacio was $1,000, which he paid to Jose A. about that time. At the time of this sale the land sold was worth $5,500. The personal property sold was worth $600. The entire value of all the property was $6,100. This was all the property of which Jose A. was then possessed. Soon after this sale Jose A. went to Mexico in the hope that the climate might restore his health. He remained there between three and four months, returned with his health much worse and repaired to the house of defendant, where he was kindly received and ministered to, and where he died July 9, 1882, at the age of 26 years. At the time of the sale to his uncle of this property, both Jose and Ygnacio knew the actual value of the property, and that it could be readily sold for very much more than Ygnacio was giving for it. Before the departure of Jose for Mexico he was spoken with by several persons as to this sale, and the fact that he had sold to his uncle for so small a price. To all such suggestions he replied that he owed his uncle much more than this land for his kindness to him; that he knew that if he ever needed assistance or care he would receive it from Ygnacio, and that he wished him to have this land; that he and his brother Daniel did not get along pleasantly, and he did not wish Daniel to have it. Upon his return from Mexico he was spoken with by his aunt, Mrs. Gulnac, and others about his condition and the propriety of making some arrangement as to his property. To all these he replied that he had disposed of all he had to his uncle and had no other arrangements to make. These, briefly stated, are the facts of this case. The pleader has well summarized the ultimate facts which he must establish in order to recover in the two allegations:

First.—That Jose A. Bernal was of weak and feeble mind.

Second.—That he made these conveyances under undue and improper influence upon the part of his uncle Ygnacio.

As to the general capacity of Jose there can be no question. But one instance is even suggested as indicating mental weakness—that a single occasion when it appears probable that he was under the influence of liquor. Upon all other instances and by an overwhelming preponderance of evidence he is shown to have been of full average intelligence and capacity. Was any undue influence exerted to procure these conveyances? In considering this question it is necessary to bear carefully in mind what are evidentiary and what are ultimate facts—those facts which raise a conclusive and those which present a rebuttable presumption. There are certain relations in which, upon considerations of public policy, the law will not permit of contract transactions—between a father and a child, a husband and wife, a guardian and his ward, an attorney and his client, and some others.

In these cases the law presumes from the very relations a certain condition of dependence, a measure of inequality, and conclusively presumes undue influence when contracts between parties thus related are called in question. Outside these instances are grouped a class of relations in which, while the law does not absolutely inhibit, it regards with distrust and scrutinizes with care—in which the position of the parties is so suggestive of the possibility of undue influence that it casts upon the party who appears to have the vantage position the duty of explaining the transactions and of freeing himself from the imputation which arises from his situation. This, in my judgment, is the position of the defendant. He did not come within the class absolutely prohibited from dealing, for his legal relation had fully ended when this deed was executed. He does fall within the second, for the reason that the grantor was his nephew, was still a member of his family, and one toward whom he had but recently held the position of guardian of his estate, almost the relation of *loco parentis*. Adding to all this that the property transferred was worth over five times what was paid, and we have a mass of circumstances weighing strongly against the transaction and calling upon the defendant for the fullest and most satisfactory explanation—for proofs cogent and convincing that the transaction thus unusual and thus circumstanced was indeed the free act and volition of this grantor—that it was not his uncle's will and importunities that had supplanted his own judgment and were representing themselves in this act.

It is said that the position and relationship of the defendant, his kindness to Jose, is of itself undue influence. To this proposition I do not assent. It is in the impulses of gratitude, the recollections of kindnesses, that such gifts are oftenest bestowed. This argument would deny to the party the right to bestow his bounty where it was best deserved. The fact that these parties were related, were members of the same household, is to be considered with suspicion and scrutinized with care—not that this is in itself undue influence, but that this Court may be assured that this position has not been taken advantage of and abused by the grantee. So also of the price paid. If this were to be taken as the only consideration moving the grantor in this transaction, it would be a fact of the utmost significance. In the mere exchange of commodities for estimated values, so gross a disparity would indicate either doubtful capacity or questionable practices; but if it be found that any element of love and affection was involved—that it was the purpose to make in whole or in part a gift—the question of inadequacy disappears, for by what rule can the Court estimate the pecuniary value of such motives? These are considerations that cannot be estimated by dollars and cents, and their presence once established, inadequacy vanishes as a factor from the case.

It is further insisted that it must be shown that the grantor "acted upon independent advice" in the matter. I have examined the cases cited in support of this proposition, and find them to be those in which the party had been either counseled by the party profiting by the transaction, or in which there was some incertitude as to interest or right transferred, some obscurity as to the result or the position of the party. I find no case in which a man 26 years of age, of sound mind and judgment, purposed by gift or otherwise to convey absolutely that which was unquestionably his own, the value of which he fully knew, the result both to himself and to others to be affected by it thoroughly appreciated, discussed, declared and intended, in which no amount of independent counsel could have made the character or consequences of his act more apparent than he then comprehended them. I find no case thus circumstanced in which independent advice has been held requisite; there was certainly no occasion for it either as matter of information or instruction to the grantor here.

These are the circumstances upon which the plaintiff relies for a recovery. Upon the part of the defendant, and in support of this deed, three witnesses besides the defendant himself are called. All testify to statements made by Jose at different times to the effect that he wished his uncle to have this property, and that far more would not repay his many kindnesses to himself, while with equal frequency and emphasis he declared that he did not wish his brother to have it, as they had not got along pleasantly together. These statements were made about the time of the sale, and both before his visit to Mexico and after his return, and shortly before his death. This was his clearly expressed wish and purpose, made at intervals of many months, and not a mere transient impulse or ephemeral caprice. From this it is perfectly apparent that Jose fully understood that the money paid was but a part of the consideration that he was receiving for this land, but that he purposed in this transaction to repay in part the obligations of gratitude. With the relations existing between himself and his uncle these were feelings that would naturally exist, and their expression might well have been expected. Upon the other hand, his dislike for his brother is equally well established, and no attempt was made upon the part of plaintiff to show that these expressions did not represent the actual feelings then existing between them. These views dispose of this case. The principles here indicated find full support in the multitude of adjudications which the assiduity and research of the respective counsel have laid before me. From these it clearly appears that while the Courts will regard with distrust and scrutinize with rigor the evidence supporting such transactions, yet when it clearly appears that the free, untrammeled will of the party has induced the act, that with full appreciation of its character and its consequences he has entered into it, the Court inquires no further into its wisdom and policy.

With the wisdom, prudence, or policy of the transaction it does not concern itself, nor upon such considerations does it interfere. He may strip himself if he will of all that industry has accumulated or that prudence would retain; he may ignore alike the ties of kindred, the claims of affection, the obligations of gratitude. He may bestow in charity or he may give to strangers. If this be his will, this his intelligent purpose, no one may gainsay or call it in question. The defendant has clearly brought his case within these principles.

Judgment that the plaintiff take nothing by his bill, and that defendant go hence with his costs.

PEOPLE vs. BERRY.

DECISION RENDERED SEPTEMBER, 1884.

The defendant above named was proceeded against before W. P. Veuve, Esq., City Justice, for the offence of disturbing the peace. He was convicted, and upon this conviction judgment was by said Justice entered. From that judgment, and also from the order of the Justice refusing a new trial, he prosecutes this appeal. The first and most important question presented in this case is one of fact. What was the judgment that was rendered? The docket of the Justice is produced here, and exhibits these entries made in this case:

1. "April 28, 1884, motion for a
2. new trial denied."
3. "Judgment $25 fine or 25 days
4. in County Jail."
5.
6. "April 29, 1884, notice of appeal
7. and bail bond fixed."
8.
9. "Ordered that defendant, as
10. a punishment for the
11. offence of disturbing the
12. peace, pay a fine of $25,
13. and in default of pay-
14. ment thereof that he be
15. imprisoned in the County
16. Jail of the County of Santa
17. Clara 25 days." "Ordered
18. that defendant be admitted
19. to bail in the sum of $50."

The words found upon lines 3 and 4, as above stated, have been expunged by drawing lines through them, while those found from lines 9 to 19, inclusive, are interlined between the lines so expunged and those immediately following. It is insisted that the words expunged, to wit: "Judgment $25 fine or 25 days in County Jail," constituted the whole of the judgment as originally rendered and entered by the Justice, and that the entry appearing in the interlineations was made by the Justice long after the original entry and after the notice of appeal given in the case. In support of this assertion, W. H. Layson, Esq., an attorney, testifies that after the judgment he took a copy of the entry upon the docket and that neither the erasure nor the lineations then appeared. It is further shown that all the judgments of this nature before and about that time pronounced by the City Justice were in the exact form presented by these expunged words, while after the 12th day of June, 1884, the form was employed that appears in the interlined phraseology. It is further shown that June 12, 1884, one Elizabeth Kirkpatrick was brought before Judge Spencer upon habeas corpus; that the Sheriff justified her detention upon a commitment from the Court of the City Justice in the exact words of the expunged lines; that Judge Spencer held that this judgment recited an alternative and therefore uncertain penalty, and was void, and discharged the petitioner, and that the City Justice was a witness before Judge Spencer in this proceding. Upon these facts it is insisted that the judgment was changed, and these interlineations written in by the Justice, to conform the same to the opinion expressed by Judge Spencer, and long after the original entry found upon the expunged lines. The facts are so cogent, the coincidences so significant and suggestive, that I make no doubt this is the case, and I understand the District Attorney does not dispute this conclusion. It is, however, insisted by him that the Justice had the right to make this change, and I understand his contention to be, that as the Justice intended to enter a valid judgment, and in fact entered one wholly inoperative, it is his right at any time thereafter to correct such error and do effectually that which he has imperfectly attempted. If this be so, it must be conceded that a power is vouchsafed these inferior Courts, in matters affecting the liberty of the citizen, which is not bestowed upon higher tribunals in matters affecting merely property interests.

A judgment has been well defined to be "The end of the law—that which finally terminates the disputes and adjusts the adverse interests of mankind—that which finally concludes and determines a judicial inquiry." (Freeman on Judgments, Sec. 2.) It is that this, as a final and conclusive result, may be attained that Courts are created; and all the machinery for citing, hearing and determining is provided, all these, the means to that as an end. To such a power and employed for such a purpose, it would seem indispensable that at some stage of these proceedings there be a finality—a period when the citizen shall know all that the law has done, and all that he is required to do. The entry of the judgment, the conclusion of the Court upon the entire matter which it was called to consider, must be that final act, the last duty which the law requires or permits at the hands of the Court.

From the fact and date of such a judgment as being an absolute finality, very important consequences follow. It not only determines the rights of the party, but fixes the date within which enforcement may be had, appeals taken, notices given, the statute of limitations set in motion. If, after this solemn determination, the Justice may, upon his own motion and without notice, arbitrarily change this judgment in one respect, he may do so in any or all. If he may alter it to conform to his better instructed views of the law, he may so do to conform to his modified views of the justice, the wisdom, or the policy of the judgment, and may so continue to alter and modify without limit or restriction. Upon principle it would seem clear that no such power can or should exist—as a practice it must lead to inextricable confusion, while the records which evidenced these changing moods of the judicial mind would exhibit the deplorable uncertainty presented by the entries in this case. Independent of this, as a matter of principle, the power to so interfere is emphatically denied by all authority. Says an eminent writer: "The failure of the Court to act, or its incorrect action, can never authorize a *nunc pro tunc* entry. If no judgment be rendered, or if an imperfect or improper one be rendered, the Court has no power to remedy any of these errors or omissions by treating them as clerical misprisions." (Freeman on Judgments, Sec. 68.) He further adds: "But the failure of the Court to render judgment according to law must not be treated as a clerical misprision. When there is nothing to show that the judgment entered is not the judgment ordered by the Court, it cannot be amended." (Freeman on Judgments, Sec. 70.) These citations from an approved text-book but give the results of a multitude of decisions, and present the law not only as it is, but as of necessity it ought to and must be. Of course, all of these cases recognize the right of the Court to correct mere clerical misprisions and omissions—the cases in which, by inadvertence, the written entry has not conformed to, or properly represented, the judicial order. Such clerical errors are always corrigible. This is simply to make the record truthfully represent the judicial action. Such, however, is not the rule when the error or omission is in the judgment as actually ordered. The mistake in the judicial mind, such an error, can only be reviewed and corrected by some formal proceeding in which parties, notice, and the right to be heard are indispensable essentials. I am of opinion that the order of the Justice found upon the expunged lines exhausted his jurisdiction in this case, and that the subsequent order found in the interlineations was without authority and void. Was the order so sought to be erased a valid judgment? This question upon an order precisely similar was fully considered by Judge Spencer *in re* Kirkpatrick upon habeas corpus, and held to be absolutely void. Of the soundness of this conclusion, either upon principle or precedent, there can be no question. The very first essential of a judgment is that it be certain and definite. If in a criminal case in which a discretion may be exercised, the result of that discretion must be clearly manifested. In this case the statute authorized the Justice to fine or imprison, or both fine and imprison, and also to imprison in default of payment of fine. To recite that the party is to be fined or imprisoned is to make absolutely uncertain the penalty to be suffered. The judgment is void for uncertainty, and must be set aside. So ordered.

PEOPLE vs. WASIELEWSKY.

CHARGE TO JURY. DELIVERED OCTOBER, 1884.

Upon the part of defendant it is insisted that if it was the defendant who committed this homicide, he is not to be held criminally responsible therefor, by reason of his mental condition and insanity at the time of the homicide. And it is further contended that even though the defendant may not have been insane on other or general subjects, and may by his actions and conduct have shown that he knew the nature and character of his act, and that it was in itself wrong, yet that he was induced thereto by an insane and irresistible impulse; and it is insisted that although a party may have a full appreciation of an act and of its consequences, yet if he was acting under the influence of this so-called irresistible impulse in committing the act, he is not to be held criminally accountable. The doctrine of non-accountability for such impulses is no new thing. It has long been a favorite speculation with scientists and metaphysical writers upon the phenomena of mind, and doubtless will be the subject of much fruitless speculation while the insane, morbid, or immoral actions of men shall demand the consideration of Courts. However interesting this inquiry may be, however painful its contemplation or important its application may be to those who embark in such speculations, it is to such moralists and theorists that it exclusively belongs. It has no recognition in that law which you are to administer—no standing in the Courts of which juries are a part.

Municipal law, which we are endeavoring to administer, purposes practical ends to be attained through practical means, and those ends are reasonably attained when it acts upon facts and premises fairly ascertainable through the ordinary medium of proofs. How is a jury to determine that the impulse upon which a party claimed to be acting was or was not irresistible? The processes through which this impulse works are purely mental, neither cognizable by the senses, nor ascertainable by proofs. All that we can possibly know is that the man has not successfully resisted—that he has yielded to the temptation. The force of the impulse, the vigor of the resistance, we can neither estimate nor know. We do know that certain passions are common to all. The law attempts to restrain their exhibition within certain bounds. Some resist and successfully, and others yield. The force of the temptation and the measure of the resistance Omniscience alone can estimate. To attempt such investigation would but confuse and embarrass fallible men. Nor would the results be desirable were such investigation possible. A man of violent passions, under the influence of a trifling provocation, kills his fellow. In another whose disposition is more phlegmatic, or his temper better controlled, the same grievance hardly excites an emotion. Is the first to find immunity and the last punishment for the same act? And yet this result must follow if this doctrine of irresistible impulse is to be recognized by the Courts, and will be the discrimination which must follow through the entire range of crimes. Such a distinction breaks down all the barriers between virtue and vice, between those who obey and those who violate the law. Its application is impossible. Its consequences would be most disastrous.

There is, however, a rule for this class of cases which, if sometimes difficult of application, is at least possible, and is deduced from facts and circumstances susceptible of proof. This rule is based upon the ability to estimate and appreciate the character and the consequences of the act—upon the capacity to know and to judge, qualities which must exhibit themselves in manifold ways, and not by incapacity to resist an infirmity which may have never appeared except in the criminal act it proposes to excuse. This rule recognizes mental infirmities which are a complete excuse from all criminal accountability—that the penal laws of the land are intended for the punishment of reasoning beings. If the defendant then was in fact, at the time of the homicide and in its commission, so disordered and impaired in intellect from imbecility or hereditary infirmity, from physical injuries or from any other cause, as to prevent his knowing the nature and quality of the act he was doing, or if he did so know and appreciate it, he was still so infirm of mind and disordered of intellect as not to know that what he was doing was wrong, such a degree of mental weakness and infirmity would render him criminally unaccountable, and you should acquit. The jury will, however, bear in mind that it is not the fact, if fact it be, that the defendant is more weak of mind or infirm of intellect than others, or than the average of mankind, that will thus excuse.

The law takes no note of the variable characteristics of men, or the varying conditions or temperament of the same individual, in determining as to criminal responsibility, but for its own wise ends it establishes one standard of accountability, and by this all are alike gauged and judged. That standard is this: Had the party sufficient mental capacity to appreciate the character and quality of the act he was committing? Did he know and understand that it was a violation of the rights of another and in itself wrong? Did he know that it was prohibited by the laws of the land and that its commission would entail penalties and punishment upon himself? If he had the capacity to thus appreciate the character and thus comprehend the possible or probable consequences of his act, he is responsible to the law for the acts thus committed and is to be judged accordingly. Upon the part of the defendant, and as tending to show that he was at the time of the homicide insane, evidence has been introduced showing that some years before the homicide the defendant was consigned to an insane asylum as being then insane and dangerous to be at large. The fact that the party upon another and former occasion was insane is a circumstance to be considered by the jury as aiding in determining whether at the time of the homicide the defendant was or was not insane; it being more probable that a person formerly insane might have a recurrence of such malady than that a person not before thus afflicted would be found thus disordered.

Evidence has been introduced before you tending to show that at the time the defendant was placed in the asylum as insane he was in fact sane, and that he stated to the officials of such asylum that he had not been insane, but that he had pretended the appearance of insanity for a purpose of his own. It is proper to consider this testimony in determining whether this alleged former insanity was in fact real or simulated, and should you find that it was in fact simulated, you will not only reject that as an instance of defendant's former insanity, but may also consider whether the fact of such successful pretense may not have suggested the availability of a similar effort upon other occasions. It is farther claimed that the defendant has been for some months past and now is insane. The only purpose for which this evidence is presented is for the purpose of aiding you in determining what was the defendant's mental condition at the time of the homicide, it being more probable that a person now insane may have been similarly affected at a former period than if such mental disorder did not now exist. Upon both these propositions, the former or present instance of insanity, if proven, these are only to be taken as circumstances aiding you in determining what was his mental condition at the time of the homicide. And the jury will bear in mind that it is quite possible for a man to have been insane at some prior and also at some subsequent period and yet to have been quite sane and wholly accountable at some intervening period.

Witnesses have been introduced before you as to certain actions of the defendant, and also as to their opinion based upon former acquaintance and observation. There have been also given in testimony the opinions of medical gentlemen, some of them speaking to a hypothetical case assumed to exist, others from the results of personal examination of the defendant. It is for the jury to judge of the value of this testimony and of its weight and effect. In so doing they will consider the opportunities and capacity of the respective witnesses, the extent of their experience, the strength of the reasons they present, and the candor and ingenuousness of their replies, and from these and kindred considerations will judge of the credit and weight to be given their testimony. Upon the issue of insanity the burden of proof is upon the defendant. The law presumes him sane, and this presumption he must overcome. That may be done by a mere preponderance of evidence, such as in a civil suit would determine a controverted issue of fact. If, however, the jury believe from the evidence that the defendant was at any time before the alleged homicide insane, and that such insanity was not accidental or temporary in its character, it will be presumed that such insanity continued, and the burden of proof will be upon the prosecution to show by a preponderance of evidence that such insanity did not in fact continue, and that the party had become sane.

The defence of insanity and the evidence by which it is sought to be established should be considered by the jury with caution and circumspection, and testimony and facts by which it is supported scrutinized with care. This is a defence which may be, and sometimes is, resorted to in cases in which the proof as to the overt act is so full and complete that any other means of avoiding punishment seems hopeless. While, therefore, this, as a defence, is to be considered fully, fairly and justly, and, when satisfactorily established, must recommend itself to the sense of humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of this mental infirmity should furnish immunity to guilt.

CHAPTER XV.

REVIEW OF WASIELEWSKY CASE.

PUBLISHED IN OCTOBER, 1889.

THE case of Jan Wasielewsky, or Jan Wasielie, as he styled himself in the later years of his life, who was executed in this city October 24, 1884, for the brutal murder of his divorced wife on June 8, 1882, was one that excited much interest in this community from the fact that the accused, from the time of his arrest to the minute that the drop fell, a period of about eight months, never ceased to feign insanity, though, so far as the *Mercury* knows, there was not a living soul who ever for an instant doubted that he was perfectly sane. The late Judge Belden, before whom Wasielewsky was tried and who pronounced the sentence of death, took a profound interest in the case, and soon after the execution had occurred said on several occasions that some day he would prepare an article for the *Mercury*, noting some features of the case to which public attention had not been especially directed. Since the death of Judge Belden the following was found among his papers, written upon scraps of legal cap and laid away with the intention of revising it at some convenient time:

The fact that Jan Wasielewsky has paid the just penalty of his wicked crime has by no means closed the inquiry which may be properly made as to his mental condition after his apprehension and up to the time of his execution. While with singular unanimity our people believed that his actions were all simulated and that the man was actually sane, few troubled themselves to inquire as to the evidences which guided alike the medical gentlemen and the Court in attaining the same conclusion.

The case was one of much notoriety; the question one of great interest; and I propose to present those sides which have satisfied me to an absolute demonstration that this peculiar conduct from his arrest to his death was a sham and a pretext, a series of ignorant and inconsistent efforts to escape the penalty of his crime by simulating a condition which he hoped some one might be induced to believe.

If this inquiry shall take a somewhat extended range, I trust it will be found that from every part of the field so explored some light is thrown upon this subject.

The evidence produced at the trial showed that Wasielewsky had been a singularly cruel and brutal husband, and that when sentenced to the State Prison he apprehended his wife would take advantage of that fact to rid herself of him. In his parting at the jail he assured her that if she did he would kill her as soon as he was at liberty. This threat he repeated in letters to her from the State Prison, and when he learned of her divorce and subsequent marriage he declared to everyone with whom he had any intercourse that this was his fixed intention.

The expiration of his term of imprisonment and his newly acquired liberty in no way diverted him from this purpose. He repeated it often, and with brutal detail declared the mode by which he proposed to butcher her; that he would cut her into beefsteaks; that he would cut her up as he would a sheep, and the like brutal expressions.

The crime, both as to the act and mode, was carried out as avowed. He dispatched his victim with thirteen stabs, most of them in the chest, stomach and abdomen, and most of them fatal wounds. These facts are recapitulated as exhibiting in this man a singular tenacity of purpose, which, it will be observed, characterized the last actions of his life. In killing this woman he had but a single purpose to subserve—revenge—and he must have known that with the threats he had so often repeated he would be instantly known as the murderer and that the utmost celerity as well as adroitness would be required for his escape. These he employed, and for two years eluded the most active efforts made for his arrest.

In 1884 it was ascertained that he was in custody at El Paso, Tex., and, armed with the necessary authority, two officers repaired to the place. One of these officers, J. E. Edson, was well known to Jan. He had been the most persistent of his pursuers, but in the presence of this man and of the Sheriff who accompanied him the defendant gave no sign of recognition, and when, after a lapse of a few days required to procure the proper authority for his removal from the Governor of Texas, they started with their prisoner, he had assumed for the first time the appearance of the lowest form of dementia.

A few words at this point as to former conduct of Jan of a similar character. In 1875, he was serving a term of imprisonment in the Nevada State Prison. He then assumed the appearance of insanity, and so successfully that upon examination he was removed to the Nevada Asylum, then in the State of California. Immediately upon his arrival at this asylum he informed the officials that he was not insane, that he had so pretended for a purpose, and hoped they would treat him accordingly. The officers watched him very closely, and testify that they never observed the slightest sign of insanity, and soon after discharged him.

While in Texas he was required to answer to two criminal charges. He pretended to be so crippled by rheumatism as to be hardly able to move, and imposed upon the officers to such an extent that he was allowed the freedom of a yard. Taking advantage of this, he scaled a brick wall some fifteen feet high and very nearly made his escape. In his flight he showed the utmost activity and no sign of decrepitude whatever.

While in custody he informed his fellow-prisoners that if returned to another county for trial he would have no trouble in making them believe he was crazy and would get away on that account.

These instances are cited as showing that by former conduct, as well as by declaration, the prisoner had already successfully acted a part, and that when now called upon to confront an accusation which admitted of no denial and could expect no lenity, this method might well have suggested itself to a mind thus schooled as the only possible mode of escape. With this appearance of helpless dementia, the officers started with the prisoner for the scene of the crime. At first the prisoner would not move, except as he was pushed or carried, but one of the officers provided himself with a needle inserted in a stick, and with this prodded the defendant until he moved in the direction desired. But one application of this kind was required, and thereafter he moved as directed.

The first night on the road he defiled the car and was severely punished by prodding, with the assurance that a still more severe application would follow the repetition of the offence. The act was not again repeated. The fact that the prisoner recognized the purpose of this punishment and so conducted himself as to avoid its repetition is conclusive proof that he possessed far more intelligence than he pretended to. The idiot who only moved as he was pushed and who was incapable of attending to the ordinary offices of nature would not so readily have changed his conduct under a single application of punishment.

Dementia of the character he was then simulating is not infrequent, but as universally observed it yields to nothing, and is amenable neither to instruction nor to punishment.

In this case the prisoner attempted a type of dementia which called for such conduct as he assumed, and he abandoned certain acts under coercion in a way which indicated an intelligence much above the state which he was pretending.

Brought to the jail of Santa Clara County he remained for several days silent, pretending inability to speak and showing no disposition to communicate with anyone.

He then suddenly developed a new and altogether different form of insanity. He indicated a desire to write, and, upon being supplied with materials, day after day wrote long letters for the newspapers. Many of these were published. As indicating the condition of his mind and the intelligent purpose which he kept steadily in view, these letters are highly instructive and interesting.

[*Marginal Note.*—Dementia does not change to active hallucination.]

The letters were all signed a Persian name. In his letters he professed to give the life of Jan Wasielewsky. He described his marriage, the trouble he had had with his wife's relatives; his imprisonment for stealing a cow, asserting always his innocence; his wife's getting a divorce and marrying a negro, and then his wanderings, the privations he underwent, and with frequency and minuteness the repeated instances in which he got bad in his head and lost his mind and the like.

It will be observed that although he assumed a Persian name he made no pretense to a Persian character—that in all these letters it was Jan Wasielewsky's life and wrongs and infirmities that made the character—all the illusion was as to the cognomen.

Hallucinations are frequent. Insane persons often imagine themselves some other person, but the hallucination is always as to the character as well as the name. No instance is recalled in which the identity was maintained and the name changed.

Proceeding with our examination of these letters, it will be observed that they are replete with his story of his wrongs, of his kindness to his wife and of her misconduct toward him, but not a syllable does he utter either of his threats against her, of the killing, or of the successful flight. The fact which, sane or insane, would have most indelibly impressed itself upon his memory, the butchery of this woman, and which, if insane, he would have known no reason for concealing, is not even hinted at. Whatever would be likely to excite sympathy for him as a wronged man, or excite a doubt as to his mental soundness, is repeated over and over, but not a word as to the homicide; not a suggestion as to whether his wife was yet living or dead is to be found. All that he thinks may avail him is stated, but not a word that can be used to convict him. In these letters thus skillfully worded, both as to what they contain and what they omit, he adds a still further incongruity. He concludes each of them with some brief reference to his angels. These were merely bits of paper which he had crumpled into a sort of effigy and placed about the floor of his cell. As incongruous as was the name he assumed, it was no more so than these angelic relations he was asserting. The insane hallucination that supernatural beings are in attendance upon a person is by no means unusual, but the lunatic who is thus ministered to does not wait upon his supernatural attendants, they minister to him, and the belief that he is thus sustained invariably makes him bold, fearless and confident. He is constantly boasting of their power and the protection they afford him, and of the great things he can accomplish through them. No such idea possessed this man. Assuming to believe that these effigies were supernatural beings of boundless powers, he treated them as trifling toys to be attended to and ministered upon by him. Like the Persian name he had assumed, angels were to him but a name. He did not simulate in the slightest a belief that they were such.

A further feature of these letters may be remarked. In one or more he referred to the fact that bad men and women were trying to do him an injury in this place and he wanted his case sent out of Santa Clara County—unmistakable proof that with all his pretenses he perfectly appreciated his situation—the sentiment of the community and the necessity of measures to be taken to relieve himself of that special danger.

After these exhibitions, first of dementia, next of hallucination, the defendant was brought before the Superior Court for arraignment. Premeditatedly the Judge himself addressed the defendant in a sharp, imperative voice: "Jan Wasielewsky, stand up." The prisoner instantly rose to his feet. The information was read to him, and the Judge, in the same tone and manner, said to him: "Jan Wasielewsky, is that your true name?" The prisoner in reply made gestures as desiring to write, and wrote: "My former name was Jan Wasielewsky; I left off the last part of the name and my name is now Wasielie."

The Judge ordered the proper correction made and then asked him if he plead guilty or not guilty. To this he replied by writing: "I have done nothing wrong."

The plea of not guilty was received, entered, and the defendant remanded. In these proceedings it will be observed that the defendant was startled from his self-possession by the tone assumed by the Judge, and responded to every direction and question as though no hallucination or mental obscurity existed. Further than that, the name he had pretended to assume was not the one in his mind, for his written answer gave not only his true name, but also a very satisfactory reason for the slight change which appeared in it, while his response to the formal question, "Guilty or not guilty?" "that he had done nothing wrong," exhibited a perfect appreciation of the fact that these legal and technical terms were understood to imply a charge of something wrong upon his part, which he was ready to understand and prompt to deny.

Returned to the jail to await his trial, which was necessarily postponed for several months, the defendant entered upon a new phase of action. He now abandoned his letter-writing [illegible] again put on the appearance of dementia, accompanied by paralysis of his lower limbs. In [illegible] representation he professed inability to talk, as also a state of absolute vacuity, and [illegible] he accompanied by repeated fasts, in which he entirely abstained from food for intervals of from five to twelve days. These facts will be hereafter considered. At the trial he persisted in these appearances, was carried by the officers into the court-room, and when placed in a chair, writhed about until he fell to the floor, where he lay apparently unconscious of all that was transpiring.

For the purpose of testing the reality of these symptoms, the physicians, while the trial was in progress, by leave of the Court, etherized the defendant. While under the influence of the ether, his struggles were so violent, and his strength so great, that it was with the utmost difficulty six strong men could hold him upon the table, while each of the legs, assumed to be paralysed, repeatedly raised from the table the two strong men who attempted to hold them down. He also resisted with the utmost violence and with an exhibition of prodigious strength the efforts made to bring him under the influence of the ether.

These experiments established conclusively that these appearances of senility were simulated. They still more satisfactorily established that the appearances of paralysis were a pretence, as there is nothing in the effect of ether to restore sensation or power to paralysed organs. Upon the contrary, its effect is to still further benumb. While the fact that these conditions did not exist, and yet were so carefully and thoroughly simulated, showed conclusively a capable and conscious mentality which was capable of conceiving and to a certain extent of successfully simulating these appearances. The fact which I claim this experiment demonstrated, that in part at least this man was maintaining a false and simulated part, is of itself sufficient to dispose of all his former and future pretenses.

With these appearances and actions on the part of defendant the trial proceeded.

The defendant was convicted, and thereafter in due form sentenced to death. No new fact of special importance was developed on his subsequent appearance in the court-room.

I now consider his fastings: One of the most protracted of these commenced about one week before the day set for the commencement of his trial and was continued until the testimony was all introduced and the opening argument made. It was then broken and the defendant ate ravenously all the food brought before him. Whether there was premeditation in the fact that this fast was broken just at that stage of the case when that fact could not be produced before the jury, or whether it was merely a coincidence, I shall not discuss. I state the fact, to be estimated for what it may be deemed worth. It may be stated as a physiological fact that the demands of the stomach for food may be termed automatic; that they are wholly independent of the will and of mental volitions; in fact, that universally, these cravings can be resisted only by the strongest and most severe efforts of the will. The instances in which persons have persistently repulsed these demands and rejected food may be brought within three classes. First, where there is some organic or functional derangement of the stomach. Second, and quite frequently, where the party is laboring under the hallucination that his food is poisoned and refuses it only as a means of thus escaping the death he imagines must follow from its use. Third, when the party proposes this as a mode of suicide.

That there was no functional or organic derangement is apparent from the fact that after these long fasts this man gorged himself to repletion without any inconvenience whatever. That he did not fear poison was manifest from the fact that when he began these fasts it was with no expression of distrust of the food or discrimination in its selection, a course universally observed with those who labor under this form of hallucination, and that when he resumed his eating it was with the most unhesitating and undiscriminating voracity; and, further, by the fact that during all these fasts he drank from a bucket enormous quantities of water, in which, had he suspected poison, he might as well have imagined it, as in the solid food which he rejected. If these abstinences were intended as a mode of suicide, we have the fact that this as a purpose intended concedes a mind capable of sustaining the body to a very severe degree of torture in order to escape some still more dreaded alternative, and the mind that could thus intelligently reason upon this situation and choose between these as ultimate consequences, and exercise this vigor and tenacity of purpose, was certainly not only sound and vigorous, but possessed of extraordinary force of will and tenacity of purpose, in these repeated fasts, and the circumstances attendant upon them.

From his mode of eating, as exhibited in the last few weeks of his life, similar conclusions may be drawn. The only articulate sounds that he uttered during this period were barks or grunts, like those of a dog or a hog--and this character of a beast seems to have been his last and ultimate effort. Besides these sounds, he then began to take his food without in any way using his hands, but whatever was placed before him was greedily devoured by thrusting his face directly into the dish, not even using his hands to retain the food while he tore it apart, and this style of feeding was accompanied by a succession of snarls and growls like those exhibited by a dog while feeding. He drank in a similar way, thrusting his face directly into the bucket, and neither raising nor tipping the bucket to facilitate his actions. In this, as in everything else, the defendant overdid the part to which he was pretending. He overlooked the fact that the dog uses his paws to facilitate his eating, and that every form of animal life, from the merest infant to the lowest form of organized life, utilizes universally and automatically every member by which food may be conveyed to the all-demanding stomach.

He fancied that the illusion that he was a dog would not be complete without he ignored the hands which the dog did not possess, and so carefully refrained from using even as paws the hands which, had his illusion been actual, should have stood as the counterpart of the animal's paws. But, beyond this, he introduced into this character a palpable incongruity which exposed the pretense. He was very fond of smoking, and this habit he could not indulge without using his hands, and so we find that while he did not use his hands at all to convey either food or water to his mouth, he used them constantly to fill a pipe, to light it and to convey it to his mouth. The illusion that could thus dispense with hands for the one purpose and still employ them for the other, simply because in that other this was indispensable, is not readily credited. It may be added that besides thus using his hands to utilize his pipe, he employed them in every other office than that of feeding himself. It may also be added that during his entire incarceration it was observed that whenever visitors were present, or he saw that his actions were observed, the defendant's exhibitions of insanity were much more marked and pronounced. That this might have been the result of natural causes had he been actually insane is conceded. The fact is simply stated.

In his last days and hours the defendant's conduct is worthy of consideration. He was repeatedly informed by his watchers and assured by the priest who visited him of the fate that awaited him and of the time fixed for his execution. To all this he responded only by his usual gruntings. But toward the last a marked change was observed in several respects. He had for several weeks refused to look directly at any person. He had kept his eyes nearly closed, with the pupils upturned, so that they could hardly be seen. On the day before his execution he raised to his feet and looked long and earnestly through his grated window upon the view without. This he repeated several times on that day and also on the morning of the succeeding day, but in all these instances, when he again turned his face to his cell, or toward his watcher, his eyes had the same closed and furtive expression that they had so long maintained. This change in the expression of his eyes is not without significance. Whether when he gazed upon the world that was without his cell he was considering the possibility of escape, or as one who looks for the last time upon a scene he was so soon to leave forever, we cannot know, but the fact remains that upon this outer world his eyes did gaze repeatedly and with unmistakable interest, while upon his cell, his watchers and his immediate surroundings, he still retained the same expression of stupid, unrecognizing vacuity.

His last night upon earth was an exact counterpart of that of every other person in his situation, the reports of his watchers state. If the effect upon all sane men thus situated, under these solemn circumstances, is thus uniform, it is a singular circumstance that one assumed to be absolutely demented, idiotic in fact, and incapable of even comprehending the situation, should have been exactly the same.

To the lunatic incapable of appreciating his situation, the approach of the fatal day, bringing no comprehension of that fate, should have brought no change in his demeanor. In this case the sleeplessness, restlessness, early rising, and every other act which characterizes, under similar circumstances, the perfectly sane, were exhibited.

Further than this, for several days before his execution the pulse of defendant was examined each day, and several times each day, and it was uniformly found to be normal, from 80 to 85. Upon the morning of the execution it was found to be 120, and so continued while he lived. This accelerated pulse is not explainable if it was in an idiot or one demented who was unconsciously approaching his end. It is, if we concede that he was fully conscious of his situation and was endeavoring, by a tremendous effort of will, to maintain a strained and unnatural part which was depriving him of all sympathy, of even recognition, and of the consolations of a religion. In this condition he, aided by the officers, stalked to the gallows. As he ascended the steps and his eye caught the fatal noose, he faltered and shrank back. The officers, however, supported him on to the trap. Then and in the few moments that remained he resumed the noises and actions of the past few weeks. As the black cap was drawn over his eyes, it is said by those who observed him closely that he stiffened and braced himself up, as do all in that position. At that supreme moment, and in that attitude, he fell. His neck was broken, and in twelve minutes from the drop life was pronounced extinct. An autopsy was held the same afternoon, which was attended by the principal physicians of the place. The brain was found to be above the average weight and to be typically sound in every particular.

In thus reviewing the actions of this man, we are irresistibly driven to this conclusion: That fully appreciating the conclusiveness of the testimony which would be produced against him, and encouraged by his former successful personations of insanity, he resolved upon this as his only hope. That not sufficiently acquainted with the types he was attempting to represent, and conscious that his artifices were failures, he attempted new characters, heedless or ignorant of the incongruities and contradictions which each new change introduced into his methods. That each new effort but multiplied the proofs as to these as pretenses, and that the case was principally remarkable for the persistency and tenacity with which he clung to a predetermined purpose, which proved wholly abortive from his entire ignorance of the symptoms of the characters and the consistencies of the maladies he was attempting to personate.

NARVAEZ vs. URIDIAS ESTATE.

DECISION RENDERED DECEMBER, 1884.

This action is brought by plaintiff, administrator of the estate of Jose G. Uridias, to recover from defendant, as executor of the last will of Juana G. Uridias, a tract of land situate in the County of Santa Clara, described in plaintiff's complaint, and containing over one thousand acres.

The right of the plaintiff to recover is dependent upon a series of quite independent propositions, which will be separately stated and briefly considered.

First.—Upon the 1st day of July, 1855, Juana Alviso, by deed purporting to convey in fee simple absolute and for a consideration of $500, conveyed to Jose G. Uridias the undivided one-third of the Milpitas Rancho. For the defendant it is claimed that this was so conveyed in trust for the better protection of the interest of said Juana.

The evidence that Jose did not pay even the $500 recited as the consideration is conclusive; and the case made shows land worth at the time $25,000 transferred without any consideration whatever. The evidence is equally satisfactory that this was conveyed upon the one part and accepted by the other as a trust and for the better protection of the rights of Juana therein; but all the proofs by which this is sought to be established are in parol. Not a word in writing, either in the deed or elsewhere, is produced in support of this alleged trust.

In my opinion an express trust of the character here relied upon cannot be established by parol. Says the Code:

"No trust in relation to real property is valid unless created or declared—

"1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing.

"2. By the instrument under which the trustee claims the estate affected, or by operation of law." (Section 852, Civil Code.)

To the same effect was the statute in force in 1855, when this deed was executed. (Hittell's Dig., Sec. 3150.) The construction which these and kindred provisions have received from the Courts is, I understand, conclusive against the trust here contended for. Without quoting, I cite Russ vs. Mebius, 16 Cal., 350; Burt vs. Wilson, 28 Cal., 632; Engine Co. vs. Sacramento, 47 Cal., 594; Gallagher vs. Mars, 50 Cal., 23; also Titcomb vs. Maird, 10 Allen Mass., 15; Walker vs. Doche, 5 Cush., 80; Wason vs. Cotem, 88 Mass., 342; Jackson vs. Carey, 16 Johns, 302; Van Benson vs. Taylor, 62 N. Y., 105; Witson vs. Drew, 74 N. Y., 531; Brown, Statute of Frauds, 263, 266, 267.

In my opinion these authorities deny the right of the party to establish an express trust by parol evidence, and in the case at bar there is no other.

Second.—After the execution of this deed Jose G. Uridias and Juana G. Alviso intermarried. Upon the 17th of July, 1868, Jose Uridias was very ill and about to die. Upon that day he signed two papers, one termed a will and the other a codicil. Both were drawn by Joseph H. Scull, and both are witnessed by the same parties, to wit: Joseph H. Scull and Juan M. Santa Ana. Three days thereafter, to wit, July 20th, 1868, Jose Uridias died.

Thereafter and in due time and form his widow, Juana, named as executrix in said will, presented the same for probate in the proper court of Santa Clara County. Hearing was had, proof duly taken, and *a* will was regularly admitted to probate and Juana was appointed and qualified as executrix of said will.

For the defendant it is now insisted that the only paper proven and probated was the one styled a "will," and that the paper designated a "codicil" was not before the Court. An inspection of the will roll in this case shows the two papers, will and codicil, upon separate sheets of paper, the codicil upon the outside and marked "Filed August 28, 1868. John B. Hewson, County Clerk." Upon the so-called will no endorsements appear. In the roll appears the testimony of Joseph H. Scull, by whom the will was proven. Upon the outer wrapper is endorsed: "Probate Court, Santa Clara County. In the matter of the estate of Jose G. Uridias, deceased. Will roll. Filed Sept. 5, 1868."

In the testimony of Joseph H. Scull, made part of the will roll, appears as follows: "At the date of the instrument now shown me and marked 'filed as of the 8th day of August, 1868,' purporting to be the last will and testament of said Jose G. Uridias," etc. The order of Court is that letters testamentary, with the will annexed, do issue to Juana Uridias, etc.

For the defendant it is insisted that this codicil was not before the Court and was not proven, for the following reasons:

1. The petition for probate of the will in many places refers to a "will" and nowhere to a "codicil"; that all the orders and answers speak of a will, of an instrument in the singular, and nowhere is more than one instrument or paper mentioned.

2. That the petition describes Juana, the petitioner, as the sole heiress of the testator; and this, it is claimed, would not have been done had the codicil been produced by her—it being argued that by the codicil only a life estate was taken by Juana.

3. The testimony of Mr. Scull, who states that he is confident only the paper styled a will was produced for probate; that had he been questioned as to the codicil he would have testified that he and Santa Ana did not sign the same in the presence of each other as witnesses; and further, that he was of the opinion when the codicil was signed that Uridias was not conscious what he was doing and was not competent to make a will. Santa Ana also testifies that he was only present once with Scull when Uridias signed any paper, and therefore would not have been there with Scull when the codicil was witnessed by the latter.

Were this matter to be disposed of upon a simple estimate of the probabilities resulting from certain facts, I should be disposed to find that this codicil was not before the Court, and that the paper to which these proceedings all refer was the one styled a will only. The presumptions, however, that attach to a proceeding of this character, attested and authenticated as these papers are, are not to be dealt with or disposed of in this summary way. As here and now presented it is final judgment—a proceeding *in rem* as to the paper so adjudicated upon. The only paper which bears any marks of authentication is the codicil with the endorsement of its filing. The paper specially referred to by the attesting witness is the document thus endorsed.

Whatever may be the result of holding conclusive this apparent determination, the consequences are much more serious and far-reaching which will permit a document thus attested and authenticated to be now called in question by parol proof. Upon the conclusive presumption which attaches to such records, I am constrained to determine that the codicil, as well as the will found in the will roll in this case, was judicially established as part of the will of Jose G. Uridias.

The only remaining question is as to the effect of the words of devise found in these respective papers.

For the plaintiff it is insisted that this codicil limits the estate devised in the will to a mere life estate in Juana, with the reversion to the families of her children, now represented by the defendant; while for defendant it is claimed that the devise attempted by the codicil is too uncertain to be operative at all.

The words of devise in these respective papers are as follows:

In the will: "All these herein declared and described things and any others which directly or indirectly may be mine, of whatever nature, present or future, it is my will that my wife, Juana G. de Uridias, possess them after my death, during her natural life; and if she should not marry and should live virtuously I appoint her by this, my only testament, my sole heiress, administratrix and executrix, with all the usufructs, benefits and acquests," etc.

In the codicil the phraseology is this: "The ends which I propose to myself are the following: That upon the death of my wife, Juana, and not before, equal lots of land be given to each of the families of her sons *or* daughters, in the portion or part of the land which may be mine in the division. They shall receive titles to permanent homes, not transferable or salable, which lots shall be given outside of my homestead, already mentioned," etc.

In the first paper the entire estate of the testator is devised to his wife in fee, and in language which admits of neither question nor debate. In the codicil there is a suggestion of a remainder which may pass to the families of Juana's children after her death. Nowhere in either document are there any words of restriction or limitation upon the absolute devise made to the widow. The most that can be said of this codicil is that it attempted to create another and larger estate, without in any way changing an existing devise which had exhausted the estate of the devisor.

I understand this to be the rule of construction in such cases, applicable alike to deeds and to wills: That the restriction or limitation upon the larger estate must be found in the very instrument creating it and in the words which create, or by direct and specific reference to such estate and as creating or limiting it; that while the words of grant or devise remain unchanged or unqualified by such direct reference, the estate will not be changed or limited by words indicating a purpose to convey or devise some further interest to another party; that such subsequent clauses are treated as repugnant, inconsistent and impossible, and the construction which conveys the present and the entire estate prevails.

Independent of the decisions upon this subject, our own Code, summarizing the adjudications, seems to indicate this as the statutory rule: "A clear and distinct devise or bequest cannot be affected by any reasons assigned to them for or by any other words not equally clear and distinct, as by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." (Sec. 1332, Civil Code.)

If the absolute estate bequeathed to Juana in the will is changed by the codicil to a mere life estate, it is so by no express words of reference, restriction, or limitation. It results solely from the argument that as a reversion to these heirs could not co-exist with a devise in fee to Juana, therefore the latter is to be limited to such life estate.

In my opinion the construction contended for by plaintiff is opposed to at least two of the provisions of the section above cited—

First.—The words by which the limitation is sought to be established are not "equally clear and distinct" with those by which the fee was devised.

Second.—It does "require an argument" to show that the estate devised to Juana was thereafter changed or restricted.

Another objection urged is this: That the phrase found in the codicil, "families of her sons *or* daughters," makes this effort at a devise void for uncertainty, as it cannot be determined therefrom which—the sons *or* the daughters—are to inherit; and authorities are cited in which just this uncertainty has made void the devise. It may be said that the word "or" is here used by mistake, and that the testator meant "and"; but as a rule the meaning of wills is ascertained by what is written, and not by what should or ought to have been said. The principal ground for considering this a mistake is that no reason appears why the testator should discriminate between these families and the equal relationship of the devisees separated by this disjunctive "or." What, however, would have been the rule had the testator thus referred as devisees to a series of religious societies or to a number of individuals only known to him through friendship, acquaintance, or respect, or had he thus designated two of a number of persons equally related to him? From the instrument itself the Court certainly could not ascertain who was meant, and the devise would have been void for uncertainty. "Or" thus employed is certainly a disjunctive. It is a phrase of discrimination and calls for selection. It is for the testator and not for the Court to make these selections; and if he fail to do it, it simply remains undone. If the Court can substitute words and phrases for those employed by the testator; if it can make that clear which was doubtful, that certain that is ambiguous, the instrument might perhaps be improved as a legal or a literary production; but the document thus transformed would be the will of the Court and not of the party. The Court would in so doing be creating and not construing.

I think there is a fatal uncertainty as to the devisees named in this codicil, and that for this reason no estate passed to them.

Recapitulating, I am of the opinion:

First.—That the express trust sought to be established in this case by the conveyance from Juana Alviso to Jose G. Uridias is prohibited by the Statute of Frauds and cannot be sustained.

Second.—That the paper called a codicil was regularly proven and probated as part of the last will of Jose G. Uridias, and is in full force and effect as such proven will.

Third.—That there are no sufficient expressions in said codicil to divert, limit, or restrict the devise of an estate in fee to Juana G. Uridias.

Fourth.—That said codicil is uncertain and ambiguous as to the devisees of a reversion; that that ambiguity and uncertainty is patent, created by the terms of the will itself, and can neither be [illegible] nor corrected by extrinsic evidence or by any judgment or determination by the Court.

For these several reasons I find that the plaintiff, as representing the reversions in said codicil, is not entitled to the possession of said land, and defendant must have judgment for his costs.

McHOLME vs. PARR.

DECISION RENDERED MAY, 1885.

Briefly summarized, the facts of this case are as follows: That in the year 188— the plaintiff rented from defendant a tract of land with the dwelling-house and outbuildings thereupon, and went with his wife to reside upon the place; that from his non-payment of rent or other causes the defendant became dissatisfied with his tenant, and indicated that dissatisfaction in many ways and by acts of petty annoyance as well as by disparaging remarks; that the plaintiff removed from the premises of defendant; that when the plaintiff went into the occupation of this place there were upon the premises some old farming utensils of but little value, and these he used while on the place; that he also purchased at auction similar articles, and took the same to these premises; that shortly before removing from the place he had a junk dealer come to the place and sold him such articles as he had no further use for; that the road by which this dealer left the place necessarily took him by the house of defendant; that defendant went to the wagon of the dealer as it passed his place and examined the articles, and claimed to recognize an old mattock and also a pitchfork as being articles owned by himself and left in the possession of the plaintiff; the mattock was of the value of about one dollar and the fork of about fifty cents; that he then informed an attorney that he had left these articles with the plaintiff and that he had sold them, and upon this representation was advised by the attorney that this constituted the crime of embezzlement. The defendant thereupon made sworn complaint before a magistrate, charging the plaintiff with the embezzlement of this mattock. Upon this the plaintiff was arrested, gave bail for his appearance, and was thereafter duly tried before a jury and acquitted. The testimony further shows many expressions of ill-will on the part of the defendant toward the plaintiff, such as charging him with having stolen a horse, saying that he hoped to see or to put him behind iron bars yet; that if this prosecution did not succeed he had others to bring, and the like. Some of these declarations were made before, some at the time of, and others after the trial of plaintiff. The defendant now moves for a new trial, and insists that he had probable cause for making this charge; second, that there was no malice in fact proven; third, that he acted under the advice of counsel.

There is perhaps no branch of the law in which the decisions are as numerous and the rules as uniform as in this, of civil actions brought for malicious prosecutions; and while the Courts have, upon the one hand, been most sedulous that the citizen who is honestly endeavoring to aid in the maintenance of the law shall not be harassed even for mistakes when honestly made, they are, upon the other hand, equally careful that the machinery of the criminal law shall not be abused as a means for wreaking personal spites, or as the adjunct to individual malice and revenge. Keeping, therefore, in constant view these two ends, they have with singular uniformity asserted the conditions to this action.

These are: "That it must appear that the party causing the arrest acted without probable cause, and with malice." Probable cause is defined as, "Such circumstances brought to the knowledge of the party as would have induced a reasonably prudent and cautious person to believe that the crime charged had been committed by the party accused." It is further held that while the most clearly established and unequivocal malice and ill-will may not tend to show want of probable cause, the malice may be presumed necessary to maintain this action. While there is in this case very strong evidence of actual malice, still, under the rule above cited, that fact might be shown from the want of probable cause. That is, as I understand the rule, the action of the party causing the arrest may be upon such meagre and inconsequent premises as to indicate utter recklessness, a wanton disregard of the rights of another, and such conduct may well stand as the equivalent of malice the most pronounced and positive. In fact, if this process may be abused with impunity by those who are only wanton and reckless in its use, a very grave defect must exist in our remedial laws. As already stated, probable cause is the knowledge of circumstances which would induce a reasonably cautious and prudent person to believe that the offense charged had been committed by the party. This involves a consideration not merely of the *corpus delicti*, but of the party against whom the accusation is made. A vagabond sneaking from a party's barn with an implement would present a very different appearance from a neighbor walking away with the same article. In the case of the latter, it might well be supposed that he came as a borrower, and a person of ordinary prudence and caution would not think of making a criminal charge against a known neighbor of former good character without at least giving him an opportunity for explanation. In this case the article in question was an old utensil in common use and of trifling value. It was an article about which a mistake, as to either identity or ownership, might be easily made. It was the one article in a wagon load of similar matters sold by plaintiff to this dealer. The plaintiff knew that this purchaser had to drive directly by the house of the defendant, whose hostility to himself he well knew, and the defendant must have known this fact and ought to have considered the improbability of the plaintiff committing a crime for such a trifle, with these chances for immediate detection. The plaintiff was the defendant's neighbor and tenant, and, whatever may have been their relations, it does not appear that he had any reason to suppose him a petty thief. Upon these facts, and without giving plaintiff an opportunity to explain, he charges this grave offense, and causes his arrest. In my opinion, and doubtless in that of the jury, the defendant, in causing this arrest, was influenced more by his feelings of ill-will toward the plaintiff than interest in the administration of justice. That he acted upon the advice of counsel is supported by a very meagre statement. The defendant says he told his attorney about it and was advised by him that this made the crime of embezzlement. What he stated to counsel is not shown. If he informed his attorney that an implement which he had loaned to a party as a mere loan had been by this party sold and the proceeds converted, the statement of counsel was doubtless correct. But had he stated to his counsel all the facts as he knew them, and as they were disclosed upon this trial; had he informed him that this man had been his tenant; that ill-feelings had arisen between them; that he had been making threats and accusations against plaintiff; that the articles he was claiming were two insignificant trifles in a wagon load of similar matters to which he laid no claim, whatever a lawyer may have told him as to the abstract question of law presented, no prudent attorney would, upon these facts, have advised him to arrest this plaintiff upon a criminal charge. The jury were undoubtedly of the opinion that in taking the advice of counsel, the defendant was more desirous of obtaining an opinion which would enable him to gratify a spite than an effort to ascertain the fact that he might vindicate a public law. I am not prepared to say that the facts of this case do not justify that conclusion. The verdict is perhaps larger than I might have awarded, but it is not beyond the bounds within which the fair-minded may be permitted to differ. The motion for a new trial is denied.

THOMAS J. AND EMMA MORAN vs. CENTRAL PACIFIC R.R.

DECISION RENDERED MAY, 1885.

But one of the several grounds urged by defendant upon its motion for a new trial need be considered. The gravamen of this action is that Mrs. Emma Moran, the wife of the plaintiff, was wrongfully expelled from the cars of the defendant at Battle Mountain, upon the night of the 20th of May, 1881; that a severe storm was raging at the time; that Mrs. Moran was drenched with rain, and that in consequence of this exposure was made sick and her health permanently impaired.

Plaintiff's counsel concedes that there was no rudeness or harshness in the conduct of the conductor in removing Mrs. Moran from the train, and that, unless the illness of Mrs. Moran was caused by her exposure to a storm of rain, the damages are excessive, and that the verdict cannot be sustained. He moreover insists that this was established as a fact, and that if there was a conflict in the evidence upon this point, the finding of the jury must be conclusive upon the Court.

The testimony upon this single proposition will be summarized.

Mrs. Moran testified that on the night of May 20, 1881, she left the train at Battle Mountain by order of the conductor. That it was about 10.30 o'clock at night; that it was "storming fearfully," raining and blowing, and had been raining for several hours; that the conductor accompanied her to a hotel; that he carried her satchel and an umbrella; that her child, then about two years old, was sick; that, through the conduct of the defendant's agents, her trunks and the articles of clothing required by the child had been left at a station on the road; that, to supply the frequent needs of the child, she had been compelled to denude herself of nearly all her underclothing. That when she reached the hotel at Battle Mountain she had on only her outer dress and one lower skirt. That she was drenched and soaked with rain in going from the train to the hotel. That when she reached the hotel she heard the conductor ask the clerk, who was standing behind the bar, if he could not give her a chair, and that she heard no more. That from cold, wet, exhaustion and anxiety, she became unconscious, and knew no more until she found herself in a bedroom with her child. That she went in this wet and bedraggled condition to bed, and recollected nothing further until about 11 the next day, when she was called to breakfast by an employé of the house.

This is all the testimony introduced by the plaintiff as to the weather upon this occasion, or as to the appearance and condition of Mrs. Moran.

From her statement it would appear that a most violent storm of wind and rain had prevailed for several hours—a storm which could not but have been observed by every one, whether in or out of it. As to her appearance, in the wretched plight which she herself depicts—drenched with rain and her child sick—she could not but have attracted the attention and fixed the recollection of the most casual observer.

Upon this question of the weather, and upon the apparent condition of Mrs. Moran, the defendant called the following witnesses:

C. C. Bethel was the conductor of the train when they reached the station at Battle Mountain. He informed Mrs. Moran that this was the place where she was to stop. She said all right. That an old gentleman, who got off at the same place, took her satchel; that he himself took her child. That, when they reached the hotel, he said to the clerk: "Here is a lady who is to stop here." That the clerk at once opened a door into a sitting-room; that Mrs. Moran immediately passed into the room and seated herself; that he placed the child in her arms; that the old gentleman placed her satchel beside the door; that he bade her good-night, and saw no more of her. That the night was a pleasant one; that there was, and had been, no rain, and that the path to the hotel was smooth and dry.

With this witness' testimony is produced his regular report, filled out upon a printed form, and dated May 20, 1881. Upon this form is a blank to be filled in by the conductor with the weather which he encountered upon his trip. Upon this form, thus reported, is endorsed, "Storm—no."

A. M. Saff was a brakeman upon this train, and remembered Mrs. Moran coming to the caboose car, and leaving the train at Battle Mountain. He was sure there was no rain that night.

Charles Hoff was the clerk of the hotel at Battle Mountain. Mrs. Moran came to the hotel with the conductor and an old gentleman. The conductor had her child; the other gentleman her satchel. He at once showed Mrs. Moran into a sitting-room and called Mrs. Huntsman, the proprietress of the hotel. Mrs. Huntsman came in and asked Mrs. Moran if she wished anything. She requested a glass of milk for her child, which was brought. Mrs. Huntsman directed the witness to show her to a room, which he did. Mrs. Moran was not wet; there was nothing unusual in her appearance or manner. It was a bright, pleasant night; was not raining, and had not rained. He had been out several times that evening and could not be mistaken.

Mrs. Nancy Huntsman was the proprietress of the hotel. The clerk informed her there was a lady in the parlor. She went in and found Mrs. Moran with her child; asked her if she wished anything; said she did not, and she directed the clerk to show her to a room which she designated. The clerk did so. Nothing unusual was seen in her appearance or actions; had there been, it would have been noticed. She was not wet. The night was a pleasant one; it did not rain at all—witness was sure of that. The next day Mrs. Moran was down to breakfast. I learned she was from San Jose. I had lived in San Jose myself, and asked her many questions about that city and my acquaintances there. She spoke of her husband having been left at Lovelock's; said the conductor on the train had treated her very politely and nicely; said nothing about a storm, or having been wet or becoming unconscious; made no request for clothes for herself or for her child. I cleaned up her room that day and saw a satchel full of such clothes as would be required for a baby.

James Brown testified that he was in the employ of the defendant at Battle Mountain; that it was part of his duties to keep a record of the weather; that he did so and entered it upon a prepared printed form, which he produces. That upon this form, rain was entered on the 9th day of May, 1881, and none thereafter until under the date of May 21, 1881, when there was entered, "Begins 7 p.m.; ends 10 a.m." That from this record thus made by himself he knows that no rain fell at Battle Mountain May 20th.

The counsel for plaintiff insists that, by this record, it appears it must have stormed upon the night of the 20th. I do not so understand it. Nor can it possibly receive this construction unless it is to be construed that an event ends before it begins.

Besides this, the party who made this and many hundred similar entries in this record, and who may be assumed to understand his own memoranda, swears positively that it does not so read and does not so mean. Independent of this, the testimony of the defendant, there is evidence on the part of the plaintiff tending to show that it did rain on the night of the 21st of May, as shown by this record.

Mrs. Moran in her testimony says that when her husband came to the hotel on the night of the 21st, he brought with him an umbrella. (Page 106, notes.) Why he should have brought an umbrella unless it was raining is not perceived, while according to the record and the testimony of Brown it was then raining and a very natural thing to be done.

We have thus in contradiction of the statements of Mrs. Moran the testimony of five witnesses that it did not rain on the night of May 20th, and two of these supplement their statements with records made by them at the time as part of their official duty, and when this suit could not have been anticipated.

It is, however, insisted by plaintiff's counsel that the impression which a fact of this character must make upon a person to whom it brought such serious consequences should outweigh that of a mere casual observer. This argument has weight as against that of the witnesses who may speak from mere unaided recollection. It is difficult to see how or why it should outweigh two systematic and contemporaneous records. Nor is it easy to see why it should wholly overcome the recollections of Mrs. Huntsman.

The deplorable appearance in which Mrs. Moran portrays herself could not possibly have escaped Mrs. Huntsman's notice.

The fact that a lady who has been separated from her husband presented herself drenched *with rain, and with a sick child in her arms*, could but have enlisted her womanly sympathies, and the knowledge that she was from the same place where this lady had herself formerly resided could but have impressed it upon her memory. It was strange that Mrs. Moran's plight should have escaped the notice of Mrs. Huntsman and the clerk. Still more strange that she should just at this time have become unconscious, and yet while in this unconscious condition have so deported herself in taking her child and accompanying the clerk to her room that her condition was neither observed nor suspected. Nor was her conduct upon the following day less significant. In all her conversation with Mrs. Huntsman and the other ladies at the hotel, she says nothing of the rough treatment of which she now complains. Upon the contrary, she says she was treated most politely by all; does not refer to the storm and her exposure and suffering; says nothing of losing her consciousness upon the preceding evening. All these, the events most recent, and most distressing, and which would have been uppermost in almost any person's mind, she does not even advert to.

Farther than this, the wants of her child, which she had so imperfectly supplied by stripping herself of needed clothing, must have still continued. It is very strange that to the sympathetic women of this house she should not even have given a hint of these needs. Her explanation of this silence is not satisfactory. She says she did not know what they would think of her if she made this statement. She must have known that the fact that her husband and baggage had all been accidentally left--a fact which she had no reason to disguise and did not attempt to conceal—explained fully the condition of herself and the wants of her child.

Estimated by the probable actions of other women similarly circumstanced, the conduct of Mrs. Moran contradicts her statements of her condition and surroundings at Battle Mountain.

With this the evidence upon this point, it can but be apparent that upon this most material point—the weather at Battle Mountain—the very great preponderance of testimony is against the plaintiff, and unless it is to be held that a verdict supported by one most deeply interested witness is not to be disturbed by any measure of proof, however cogent and convincing, this verdict must be set aside.

That it is not merely the right but the duty of the trial Court to set aside the verdict of a jury as against the weight of evidence, has been too often asserted in the Courts of this and every other State to require either argument or citation for its recognition. The frequency with which it has been done by the Supreme Court—even when such verdicts had the apparent support of the trial Judge—is not the mere emphasis of the rule, but may well stand as a judicial admonition to the Court first called upon to deal with such questions.

Says the leading law writer upon this branch of the law, in language often quoted with approbation by the Courts: "The authority vested in Courts of law to order new trials was not intended to be a mere formal, barren and inoperative power. It was intended, on the contrary, to supply a salutary guard against the mistakes, passions and prejudices of juries. The Judge was not designed to be a mere automaton to register the verdict of juries in all cases against the manifest justice of the case, and against his own convictions of right. The law supposes that he will exercise an effective, scrutinising and controlling judgment. Nor does the fact that there has been evidence submitted to the jury on both sides of the point at issue exclude the exercise of this beneficial power of supervision. * * * If the Judge conscientiously believes that the verdict is against the truth of the case—that it is contrary to the weight of the evidence--he is bound to grant a new trial. His conscience and his duty should not be satisfied by ingenious speculations on the possible mode by which the jury arrived at the conclusions which they reached, but require of him to ascertain if those conclusions are the natural, probable and logical conclusions from the testimony. If the evidence is balanced, or nearly balanced, if the character of witnesses be impeached, if the opinion of the Judge inclines first to one side and then to the other, he ought not to disturb the verdict. But if he is convinced that the verdict is against the weight of testimony, it is the duty of the Judge to grant a new trial. Otherwise the power of Courts over verdicts is a mere delusion and a mockery." (Graham 2, Waterman on New Trials, 1206.)

The principle upon which such questions should be decided cannot be better stated. The substance of a multitude of decisions cannot be better summarized than in the foregoing citation.

The application of this principle to the facts of this case, as herein summarized, must determine this motion in defendant's favor.

In conclusion I may suggest that had the single question I have to consider been submitted to this jury; had they been called on to answer, was Mrs. Morgan exposed to a rain storm on the night of May 20th, I cannot believe they would have responded in the affirmative. But very many questions were in issue before them, and they may well have overlooked or mistaken the evidence particularly applicable to this most material proposition.

As now presented, it is too plain to be mistaken—too material to be disregarded.

The verdict is set aside and a new trial ordered.

SENTENCE OF JAMES BEE.

DELIVERED JUNE, 1885.

I am called upon in the discharge of my duties here to pass judgment upon all classes of offenders; upon men who have committed crimes of violence under the influence of hasty and ill-judged resentment; crimes of revenge, under, perhaps, the pressure of an imagined motive; crimes which have their origin in sudden temptations—of an offered opportunity to aggrandize the party—or under the pressure of want. In every form in which crime can present itself I am called upon in some manner to exercise my judicial discretion, and in almost all of these cases I can find some circumstance to palliate the offense, and something which if it does not excuse at least explains the conduct of the offender. But of all the crimes that are brought before me this, in my judgment, is the most atrocious—the most inexcusable—the most far-reaching and disastrous in its consequences, and its punishment should be the most severe. Causeless, purposeless and senseless, in its results it may involve the whole community; you might have laid the two principal cities of this continent in ashes and made four-fifths of its population paupers—have left helpless women, children and decrepit men homeless and shelterless—wanting their very bread. For such a crime the community cannot afford the chances of even reforming the offender; your whole worthless life would not make ten per cent.—one-tenth of one per cent., the one-hundredth of one per cent.—of that which in two nights you wickedly destroyed. You fancied, you say, that you were harming the rich; that it was capital and opulence alone that was to suffer from your conduct. In the warehouse that you burned the wealthy protected themselves by insurance, or if they did not they at least had something left after this was destroyed; but the poor farmers, that made the majority of those that were injured by your act, had neither the means nor the opportunity to take this precaution; for them a year's work was swept away and they are left that much poorer. Had you burned this town or burned Santa Clara, as you purposed, nine-tenths of the consequences would have fallen upon the poor, upon the laborers; they were the ones that were not protected by insurance—that when the fire once sweeps by them have nothing but ashes and their poverty remaining to them. For such a man, so senseless, so purposeless, the consequences of whose acts may be so fell—so far-reaching, it is useless to talk of leniency. The proofs against you were conclusive. It did not require your confession to have secured your conviction. You left upon every hand and in every direction the footprints that guided the officers with unerring certainty to you, that proved you the perpetrator of these deeds. That you have done nothing before, that you will do nothing hereafter, is a very poor consolation to those that you have ruined—to those that you would have destroyed could your purpose have been effectuated. For such an offender, in my judgment, all the mercy that is to be found is found in the limit that the law fixes for the punishment of such a crime.

I certainly am not disposed to take the chances of subjecting the people of this county, of this State, of this nation, or of the world, that are endangered by your being at large, to a repetition of your two-nights' record in this county.

Upon the information here presented, the judgment of the Court is that you be imprisoned in the Penitentiary of this State for the term of ten years.

You are proceeded against, James Bee, by another information, for the crime of arson in the second degree, alleged to have been committed in the burning of the property of the South Pacific Coast Railroad, on the 1st of June, 1885. Upon that information you entered a plea of guilty. Have you now any cause to show why judgment of the law should not be pronounced against you?

Bee—Well, all there is, they set a great many men tramping last winter on the road. They had a job on the Felton road; they was pretending to hire men in San Francisco, and sent them up there and gave them no work and sent them out on the road tramping, and had three big gangs of Chinamen up above, where there was nice work going on—men work half a day and they discharge them, giving the poor white man no show at all; that's the cause.

The Court—Do you think the community will look more kindly upon the laboring man when you were there representing them by burning the houses that sheltered their families; by burning the buildings that stored their harvest; that capital will be more liberal and more generous in building houses for you to destroy; that it will embark in enterprise for such as you to ruin? You have mistaken the sentiment of the community and of men. Capital does not risk itself where they permit such crimes to go with impunity. The laboring men can but look upon you with detestation as their most dangerous enemy. As I have said before, if your mind be weak your purposes for mischief were strong, and your competence to take the necessary steps to not only accomplish your crime but to secure you from detection show care and cunning and skill, while the means and appliances with which you furnished yourself showed that you were familiar with these arts of burning and firing buildings, and the appliances that were brought from your possession show a familiarity with acts of this kind altogether inconsistent with your statements, if this is your first offending. If I have any regret in this matter, it is that you were not found sooner; it is that the law that punishes you is not even more severe. I see nothing in the circumstances of your crime that calls for the slightest exercise of lenity. The judgment of the Court is that you be imprisoned in the Penitentiary of this State for the term of ten years; and it appearing that the prisoner is now under conviction for a full term of ten years not yet entered upon, it is ordered that this second term of imprisonment do begin at the expiration of the first term. The State Prison at Folsom will be the place of imprisonment.

BROWN vs. CITY OF SAN JOSE.

DECISION RENDERED JULY, 1885.

The proceedings in this case, as exhibited by the affidavit of Wm D. Brown, the return of the defendants and the facts as admitted upon the hearing, show: That Wm. D. Brown is now the Chief of Police of the City of San Jose, duly elected, qualified and acting, and that the term for which he was elected has not expired; that the defendant C. T. Settle is the Mayor of San Jose, and the other defendants are members of the Common Council of said city, all duly elected, qualified and acting, and that the terms for which they were elected have not yet expired; that there has been instituted before said defendants in their official capacity as Mayor and Common Council of the City of San Jose a proceeding against W. D. Brown as Chief of Police, for the purpose of removing him from said office for violation of his official duty.

Upon the part of the plaintiff it is claimed that this proposed action is without authority upon the part of said defendants, and that they have no jurisdiction to institute said proceedings or to try or to remove said plaintiff from said office.

Upon the presentation of these matters by affidavit upon the part of the plaintiff, an order was issued by a Judge of this Court directing said defendants to show cause why they should not be perpetually enjoined from farther proceeding with said action, and that meanwhile, and until the hearing and disposition of said question, they be restrained in the matter. To this order the defendants by the City Attorney now respond and show cause for the action and proceeding taken by said defendants, and ask that they be permitted to proceed with the same.

There are two principal objections urged by the plaintiff against the proposed action of the Mayor and Council:

First.—That the Council is not a legally constituted board in that two of its members now reside in other wards of the city than the ones in which they resided when elected Councilmen.

Second.—That if a legal body, the Mayor and Common Council have not jurisdiction of the matter and have no power to try or remove the Chief of Police as proposed.

It is admitted that V. Koch was, upon the 14th day of April, 1884, a resident of the First Ward in the City of San Jose; that upon that day he was elected a member of the Council from that Ward; that after said election and before these proceedings were inaugurated he removed to and ever since has resided in the Fourth Ward of said city; that G. W. James was, on the 13th day of April, 1884, elected a Councilman from the Second Ward, and that in like manner he removed to and now resides in the Third Ward in said city.

The term for which these officers were elected has not expired, and both of them attend as Councilmen at the meetings of the Council, are recognized and received as regular members thereof, and take part in all the proceedings of the Council as fully as do any of the other members of that body.

The right of these parties to act as Councilmen and to take part in these proceedings cannot be called in question in this collateral proceeding. The rule is well settled by a multitude of adjudications, as well as in the very necessities of the case, that the right of parties who are *de facto* exercising the duties of a public office can be called in question only by a direct proceeding instituted against them as such officials to try their right to the office in question.

This question underwent the most exhaustive examination in State vs. Carroll, 38 Conn., 458. The cases were reviewed in this opinion from the first one reported in the Year Books in 1431, and the conclusions reached have been cited with approval in every examined decision upon that subject to the present time. In classifying the cases, said the Court: "That action is upheld as under color of office where there was a known and valid appointment or election and where the officer had failed to conform to some precedent, requirement, or condition, as to take the oath of office, give a bond, or the like"; and the Court held "that it was color of office for an official to be publicly and notoriously discharging the duties of an official position with the general knowledge and apparent assent of the community in which those functions were discharged." (See also Fowler vs. Beebe, 9 Mass., 233.)

In this State, in People vs. Sassovich, 29 Cal., 480, a conviction for murder, it was held that the defendant could not be heard to question the right of the Judge who presided at the trial to the office of Judge, and this decision was approved and re-affirmed in People vs. Provines, 34 Cal., 523.

Independent of the authorities, which are numerous and uniform, the absolute necessity of such a rule is apparent. If this party can in this indirect manner disqualify those officials, in the same collateral way it may be done in every proceeding in which the validity of an ordinance, the effect of an appointment, the levy of a tax, or any other form of municipal action may be presented. The consequences of such a rule would be intolerable and would not be confined to municipal officers. They would apply with equal force to every official in every department of the government. It is not in the power of the citizen nor is he required either to question or to know the right of those representatives of the government who present themselves to him with all the indicia of apparent right, as well as authority. To their commands he must yield obedience; their aid he may invoke and securely, nor should he suffer though it should thereafter be found that the right had not been co-existent with the assertion. If the right be called in question it is by a direct proceeding to which the incumbent is a party, and the determination is of the right itself.

The cases in 53 California and of McGarvey vs. Hartnell in no way militate against the principle. In both the proceeding was direct—an adjudication as to the incumbency of the office and nothing more. The fact that in deciding as to the present status of the official the effect of a former removal was considered in no way qualifies the rule. In the cases now under consideration the Courts may in some proper proceedings adjudge that the removal of these Councilmen from the wards in which they were elected vacated their offices, but they will none the less hold that each and every intermediate official act in which they participated before such adjudication was as valid and effective as though no such removal had taken place. The question of the qualifications of these Councilmen cannot be considered in this proceeding.

It is next insisted that the removal from office of officials of this class can be had only by the finding of an indictment by a Grand Jury and a prosecution thereunder in the Superior Court, in accordance with the provisions of Section 758 and following of the Penal Code; while upon the part of the defendant it is contended that the authority to act in this matter is expressly given by the Legislature in the City Charter. The portion relied upon for this authority reads as follows: "The Common Council shall have power to remove, for good and sufficient cause and after notice to the party accused, by a three-fourths vote, with the Mayor's approval, any and all city officers, whether elected or appointed (members of the Board of Education excepted), and to fill any vacancy so caused."

For the plaintiff it is contended: First, that this provision is repugnant to Section 6, Article XI., of the State Constitution. Second, that if not repealed in terms, it is by implication, by Section 758 and following, before cited, of the Penal Code. Third, that the Chief of Police is not a "city officer" referred to in Section 9 of the City Charter. That part of Section 6, Article XI., relied upon by plaintiff reads as follows: "And cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws."

The Charter of San Jose, it is claimed, comes within this provision, and is to be controlled by the general law found in Section 758 of the Penal Code. This precise question was before the Supreme Court in Desmond vs. Dunn.

In considering the effect upon the Charter of San Francisco of a general law enacted after the creation of the Charter, said the Court: "The Charter of the City and County of San Francisco, which antedates the present Constitution and was not passed or adopted by authority of it, is not subject to or controlled by general laws * * * Many of the provisions of this Constitution unmistakably refer to charters to be framed or adopted after the adoption of the Constitution, and it is clearly our duty, upon well-established principles of construction, to hold that any general provisions which seem to conflict with the special provisions were intended to apply to charters framed subsequently to the adoption of the Constitution." (Desmond vs. Dunn, 55 Cal., 247.)

As the Charter of San Jose, alike in its inception and all of its amendments, was in force long before the adoption of the Constitution, the question here presented is brought directly within the rule above laid down.

But were this not the case, and had we to determine this case without the aid of this authoritative adjudication, the application of general principles and elementary rules of construction must lead to the same conclusion. Let the question be tested, as is claimed should be done, by the ordinary rules of statutory construction—that the Legislature, by providing a general and comprehensive scheme, will be taken to have intended the repeal of all former legislation falling within this general description.

The question presented is still one of legislative intention, to be ascertained by contemporaneous and subsequent enactment, as also by a comparison of the two enactments, repealing and repealed. If the later, the larger and more comprehensive, embrace as to the remedy afforded and the object accomplished all contained in former enactments, they will be taken as repealed by it. If, however, these are but partially embodied in the later Act, if remedies which should be provided are found only in the original Act, the later enactment will be taken as only cumulative and both provisions will stand.

In the present case the provision of the Penal Code, Section 758, was not a new or original provision of the Code. It was taken bodily from former statutes, and with two amended sections which do not affect this argument is found in Hittell's Digest, Vol. 2, page 1653. While its effect as a present law is of course dependent upon this re-enactment in the Codes, the proposition that there was in this mere re-compilation any very manifest purpose of repealing provisions found in nearly all of the municipal charters of the State is not observed.

Does Section 758 of the Penal Code furnish all the remedies afforded by the Charter? An examination and comparison of the two shows very clearly that it does not.

Under the statute the official must be proceeded against by indictment of a Grand Jury, "for willful and corrupt misconduct in office," upon which accusation there is to be a regular trial by jury upon a plea of not guilty, with all the presumptions as to innocence and the effect of a reasonable doubt which apply in criminal cases generally. Or under Section 772 an accusation may be presented in a Superior Court charging the party with collecting illegal fees, or that he has refused or neglected to perform the duties pertaining to his office. If the charge thus made be sustained, the statute fixes the penalty—he is to be removed from office and fined $500. In both these cases criminal misconduct, actual turpitude, must exist and must be proved.

Under the Charter the proceeding is summary—a vote of three-fourths of the Council removes, and this for good and sufficient cause shown. No other consequences follow than the prompt removal of the derelict official. It will be readily perceived that in promptitude of action, facilities for establishing the case, and the scope of the inquiry, the proceeding under the Charter is far more comprehensive and effective than under the Code. Under the former, moral, mental, or physical defects rendering the officer wholly inefficient, and that without any willful misconduct upon his part, may furnish abundant cause for his removal, while of these same defects, however conspicuous, the Code takes no cognizance. It will be thus seen that the Charter is in every respect more summary, prompt and comprehensive than the Penal Code, and I see no reason for supposing that the Legislature intended the less effective system to supersede the more ample one.

I have thus far considered the question as one of the repeal by implication of one ordinary statute of general legislation by another. Where, however, the principle is invoked as to repeals of charters, a much more stringent rule obtains. Said our Supreme Court: "It is a principle of very extensive operation that statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities. Such repeals are not favored, and it has accordingly been held that where the provisions of a city charter and the general law upon the same subject were conflicting and irreconcilable, the provisions of the former were not repealed by the latter." (Wood vs. Election Com., 58 Cal., 563.)

Numerous authorities are cited in support of this doctrine, and as the decision was as to the effect upon the City Charter of the provisions of the present Constitution, it is equally decisive of the question here presented.

It is, however, contended that the Chief of Police is not a "city officer" within the meaning of Section 9 of the Charter, and an argument in support of this proposition is made from the verbiage of warrants, that they run to the Chief of Police of any city, etc. The form of all criminal warrants is prescribed by the Penal Code, and they run to all policemen as well. (Sec. 817, Penal Code.)

If there be any force in this objection, the policemen as well as the Chief of Police are each and all alike beyond removal by the Council.

Independent of this argument, the Charter would seem to admit of no doubt as to all city officers, and subject to removal as such. Says the Charter: "A Chief of Police shall be elected at the charter election to be held on the second Monday in April, 1876, and each alternate year thereafter, who shall hold his office two years, and until his successor be duly elected, unless removed as hereinafter provided. * * * " (Sec. 3, Charter.) Not only a direct designation of this officer as a city official, but also as one for whose removal as well the Charter has made express provision.

Again, in Section 9, where provision is made for the removal of officials, says the Charter: "Any and all city officers, whether elected or appointed (members of the Board of Education excepted)."

The familiar rule that the expression of the one is the exclusion of the other applies with special significance to this particular exception made of the Board of Education and greatly strengthens the effect of the preceding paragraph.

" Any and all city officers." Unless the Chief of Police is included within these provisions of the Charter, it is not easy to perceive what city official is referred to.

Other objections are made, but they relate to the manner in which the defendants were proceeding, and the modes they are pursuing in this inquiry. The Charter which confers the power, is silent as to the practice. In such a case I understand that the practice prescribed by the statute for analogous proceedings is a proper method to be pursued. This seems to be substantially the course adopted, and I see no just cause for criticism of it.

Be that as it may, it is no more than error and cannot be considered in this proceeding. The Mayor and Common Council are in this proceeding an independent tribunal. They neither walk nor act under the continuing guidance of the Courts. That they are acting without jurisdiction is the only question this Court can here consider, not that they do, or may err, within the power granted them. For errors so committed there may or there may not be a corrective. Certainly none can be afforded in this form of proceeding.

This opinion has been submitted to my associate, Judge Spencer. I am authorized to state that in the views expressed and conclusion reached he concurs.

The order heretofore made enjoining and restraining these defendants is dissolved, and defendants go hence with their costs.

BROWN vs. ANDERSON.

DECISION RENDERED JULY, 1885.

Upon the 27th of October, 1883, the defendant entered into a contract with one A. M. Stoddard, by the terms of which defendant agreed to purchase from Stoddard all the prunes and other fruit "to be produced during the year 1884," upon a tract of about fifty acres, then owned by Stoddard. For the crop he was to pay $2,666.66, payments to be made as follows: At date of contract, $100; $900 on or before the 1st of January, 1884; "and the balance when the crop is taken off at the expiration of the year." It was further proved that Anderson was to be permitted to purchase the crop for the year 1885, "paying therefor $5,333.33⅓, payable: $100 on or before January 1st, 1885, and the balance at the time the crop is removed for that year." The contract further provided that Stoddard was to "cultivate and take good care of the trees." Upon the 29th of December, 1883, Stoddard conveyed this tract of land to plaintiff, and at the same time assigned and transferred to him this contract with Anderson. After this purchase by Brown, the latter employed one "Preshlow" to prune and trim the orchard. The trees were mostly French prunes, and were four years old when this contract was made. Upon the 30th day of July, 1884, the defendant gave notice in writing to plaintiff that he rescinded the contract before made with Stoddard and assigned to him, Brown, and with this notice tendered to plaintiff the value of some cherries gathered upon the place and further offered to restore and return all that he, defendant, had received under said contract. The principal ground upon which defendant claimed the right to so rescind was that the French prunes had been improperly trimmed, and that in consequence of this improper and unskillful pruning no fruit had been produced. The plaintiff refused to accept said rescission. Plaintiff sues to recover the balance upon the payment to be made for the crop of 1884.

For the defendant it is objected: 1. That this contract is not assignable, and that plaintiff, therefore, cannot recover upon it. No authority is cited in support of this proposition. None, in my opinion, can be found. Had not this contract passed with the sale of this orchard, a very anomalous condition of things would be presented. Stoddard would be compelled to keep in order an orchard he had sold, and Brown could neither take care of the trees which he had purchased nor receive the value of the crop which was growing upon his land, and this, under this contract, could be continued for two years, and might have been for ten. That this is a contract which ran with the land cannot be questioned. It is next insisted that this action is prematurely brought. In the contract, provision is made for the payment for two successive years. As to 1884, the phraseology employed is this: "Balance when the crop is taken off at the end of the year. * * *" For 1885 this is the language: "Balance at the time the crop is removed for that year." I do not agree with the counsel for defendant that the term "year" as here employed refers to a calendar year, nor that these payments are to be postponed until the crops are matured. If the expiration of the calendar year were meant, then the reference to the taking off or removal of the crop was wholly superfluous. The term "year" is here employed as it is in other agricultural contracts in which a crop—the fruits of a season—is the subject provided for. The argument that these payments were to be postponed until the gathered crop was removed from the place is still more fallacious. The bulk of this crop was prunes—only marketable when dried, and capable of being stored for many years. If defendant's reasoning be sound, by merely housing this dried fruit upon the place the defendant could postpone these payments indefinitely.

This complaint was filed October 29, 1884. At that time all the fruit upon this place had fully matured and had been gathered or had perished. I make no doubt that the crop—the fruit season of that year—as contemplated by this contract—had fully ended when this complaint was filed. The principal question presented is as to the right of defendant to rescind this contract. Stoddard, by his contract, was to "cultivate and take good care of the trees," an obligation which passed to and was accepted by his assignee, the present plaintiff. That in most respects he performed this duty is not questioned, but it is claimed that in the matter of the French prunes the pruning was excessive and unskillful. It is admitted by most of the witnesses that there should have been eighty tons of prunes produced. It is shown that not over two tons were grown—not enough to pay for gathering, and that they were not gathered. This enormous disparity between what was anticipated and what was realized is, it is claimed, owing to the excessive pruning. Upon the other hand, it is claimed for the plaintiff that these trees were properly and skillfully pruned, and that the failure of the crop was owing to the season and causes over which plaintiff had no control. To this point many witnesses familiar with the habit and accustomed to the management of this variety of trees have been called and examined.

Their testimony will be summarized. John Britton, J. S. Fowler, J. Q. A. Ballou, George A. Flemming, Charles D. Thompson, and W. W. Cozzens were called and examined for the defendant. They each testified to large experience as orchardists, and familiarity with this variety of trees. All agreed that these trees were pruned excessively short and that the failure of the crop was owing to this cause. The reasons assigned by these witnesses are these: That by short pruning, in the first instance, many buds are cut off which would and should be permitted to produce fruit. Further, that by such short pruning, the remaining buds are unduly stimulated and an excessive growth of wood and twigs is produced at the expense of the fruit. The explanation of this I understand to be: that most of the buds of a fruit-producing tree contain within the one bud the two embryos of fruit and wood; that when properly trimmed, the tendency of the tree is to develop the fruit embryo and the wood-bud remains dormant, while if unduly shortened the tendency of the tree is to develop the wood-embryo, while the fruit-producing one remains dormant or becomes atrophied. Upon the part of the plaintiff, to the same proposition, were called and examined: A. M. Stoddard, S. H. Brown, George W. Malone, R. D. Freshlow, Patrick Kenniff, F. A. Allen, and W. C. Geiger. These parties all testify to large experience as orchardists, and give as their opinion that this orchard was properly pruned. It farther appears from the testimony of all the witnesses that there are two systems or modes of pruning in vogue, and that each has a numerous school of followers; that the witnesses called by the defendant favor the long method, by which one-half or even less of each year's growth is cut off, while the other class, represented by plaintiff's witnesses, remove two-thirds or three-fifths of the yearly growth; that the merits of the two systems have been the subject of much debate and of much experiment, and that both methods are extensively practised and advocated. The witnesses, farther, all agree that the course to be adopted would be largely dependent upon the age, the growth and the vigor of the trees, and that the results might be affected or materially modified by the character of the season. It was farther testified by Stoddard that when and before he sold the crop to the defendant he showed him his method of pruning, which was the short mode afterward pursued, and that he expressed no objection to it. It was farther shown that the French prune was a somewhat capricious and uncertain bearer; that the general crop of the year 1884 was much below the average; and that other orchards trimmed as was this produced a crop equal to the average of that season.

The general rule which governs cases which require special skill, or skill in a particular direction, is well understood and easily stated. The party is to exercise that measure of skill which is shown by the reasonably well-instructed in that special pursuit. This is the measure of diligence generally exacted, whether it be the services of a physician, a lawyer, a mechanic, or an orchardist, that are the subject of inquiry. In most cases, this rule is easy of application. With the abstract proposition as to what is skill exercised or established, the Court has only to determine whether the particular facts conform to the ascertained rule. In the present case, however, the standard is itself in dispute—or rather two standards are asserted, each supported by about the same measure of proof. By one of these plaintiff's course would be justified—by the other condemned; and the Court may in this case adjudge the one system improper and in another it may determine exactly to the contrary. It would be substantially the Judge determining, conclusively and as a matter of law, that which skilled orchardists cannot agree upon as a matter of fact. Nor would the rule, if thus applied, be confined to this or any other class of cases. It would necessarily be as broad and far-reaching as the range of human pursuits; every trade, art, or profession would come within its operation, and what would be the result? Take for instance, medicine. This profession, it is well understood, is divided into schools, practising by altogether dissimilar methods. A patient employs a physician practising by one of these systems, and then, dissatisfied with the result of his treatment, brings suit, and establishes unskillfulness by calling in the practitioners of a different and antagonistic school. The consequence would be that the Judge of a *nisi prius* Court would be required to determine definitely in passing upon the rights of a party that upon which the scientists and specialists of the world are unable to agree—as to which is the most skillful and the better method. The consequences of such a rule conclusively establish its unsoundness. In my opinion, when a considerable number of specialists in any pursuit or calling adopt particular methods as most conducive to success, it is not negligence or want of skill to pursue such methods, even though many or more in the same vocation may pursue a wholly different course; that when such dissimilar methods are so conspicuously practised that the reasonably well-informed in the community should know of their existence, parties who may be concerned in the results of such methods should indicate such preferences or they will be taken to have acquiesced in the system employed by the party with whom they are dealing. In the present case Stoddard showed the defendant the mode of pruning that would be and that was thereafter pursued, and to this the defendant made no objection. Had Stoddard thereafter pursued the other method, and had a failure followed, the defendant might well have complained that he purchased from his confidence in the course which he was assured would be pursued. It might give him a singular advantage if he can now object, with equal force that the course indicated to him was strictly pursued. Nor can the Court have any certain assurance that the failure of a crop of fruit is owing to any particular cause. Such failures, whole or partial, constantly occur, and the most skillful of orchardists are unable to assign the cause; parasites, disease, climatic conditions at particular periods, may produce results which no forethought could have guarded against, no skill have prevented. Such a cause may plausibly be assigned to the present case. The season of 1884 was entirely exceptional. The rainfall of May and June was entirely unprecedented in the history of the State, and produced an abnormal growth of almost every variety of vegetation. It well may be that this extraordinary moisture caused the wood-development that was so fatal to the fruit in this orchard, or it may have prevented the formation of the fruit, or have caused it to fall off after forming—and that which may have proved most pernicious for a season thus unusual might, under ordinary and usual climatic conditions, have produced the beneficial results expected. Exceptional results may well be anticipated from an exceptional season, and I see as much in the season as in the management of this orchard to explain the failure of this crop. It has been farther argued that the red spider was permitted to remain upon these trees. I do not understand that this in any way explains the total failure of fruit. That the trees may have been weakened or the quality of the fruit impaired by this parasite may be conceded, but the failure of fruit form cannot be attributed to that cause.

In examining this case I have found but few adjudications upon the principal propositions discussed. The analogies all seem to point to the conclusions announced, and the rule indicated seems to be a necessary one. To apply the opposite principle would be to place the fruit-grower at the mercy of the buyer. The latter could make his contract, making a part of his speculation the various chances which may affect the crop; should these go against him, he can then escape his obligation, not by showing any want of diligence or effort upon the part of the orchardist, but by questioning the relative merits of some debatable method which may have been pursued in the culture.

For the reasons above given, I am of opinion that there was not such want of skill on the part of plaintiff as would entitle this defendant to rescind this contract, and the judgment must be for the plaintiff. It is so ordered.

CHAPTER XVI.

BEGGS vs. TRUSTEES OF LAKESIDE SCHOOL DISTRICT.

DECISION RENDERED AUGUST, 1885.

WHEN I overruled the technical objections that were made this morning, I did so for the reason that I thought the public interest required that this matter should be promptly disposed of and upon the merits. In that spirit I now propose to consider it. The very trifling matter in which this controversy has arisen cannot but have impressed all who have attended this trial. Here are a very large number of citizens brought here from a distance, at no inconsiderable cost and expense, all for the reason that a refractory boy refused to stay in the school-room during five minutes of the noon intermission. Insignificant as this may appear as a cause, from trifles as small neighborhood feuds have arisen that have endured for years and even for generations, and that have wrecked not merely the efficiency of schools, but have destroyed the peace and the harmony of entire communities. It seems to be the natural tendency of just such controversies to drag into them families; to create factions and no end of strife, ill-feeling and contention. I do not propose by protracting this controversy to encourage this possible discord, and only hope that the many very sensible persons who have appeared in this case may be warned by these suggestions in time to avoid this probable danger. There can be no misunderstanding as to the powers and duties of a school-teacher. In the school-room there can be no modes but such as he prescribes; no will but his. If the pupil can be permitted to question by disobedience the directions of the teacher, that is the end of authority, of discipline, of usefulness. The regulation that one is permitted to defy, all may infringe, and the result would be but chaos and confusion.

If the course pursued by the teacher be not approved, the corrective must be in the directions or suggestions of the School Trustees—to these parents can make known their grievances, and here must be found the remedy. In the present case a rule of the school prohibited the children leaving the room without permission from the teacher; a rule that I presume obtains in every school, and that is indispensably necessary.

This boy went out without obtaining this permission. He claims that the situation of his horse made it necessary for him to do so. That may be so, though I can hardly understand why he could not have stated the urgency and obtained the required permission. He did not do so, however, and when he returned the teacher informed him that as a punishment he would have to remain in the room for five minutes of the recess. This he refused to do, and though the penalty enforced was a mere trifle, that caused no suffering and involved but a mere detention, he set the command of the teacher at defiance and left the room. Informed by her that if he would not obey he could leave, he returned home, and his father, informed by the boy of what had occurred, immediately returned to the school-room, and in the presence of a number of the scholars questioned the teacher as to her right to make such rules, and denied her right to enforce them; refused to make any concession whatever or to permit the boy to make any, but asserted that, without punishment or penalty for his flagrant disobedience, the boy should be at once restored to the school. This conduct of the father was inexcusable. Where, as in this and many other instances, large boys are placed under young female teachers, the authority of the teacher to be effectual should be seconded to the utmost by parental influence and control, and not a word should be uttered to in any way weaken the respect which should be felt for the teacher. If the parent wishes to make a complaint, or to offer a suggestion, it should, if made to the teacher at all, be wholly without the knowledge of the pupils. Both in the place selected and the mode pursued in this instance Mr. Beggs was most unfortunate. He was equally unhappy in the letter which he addressed to this teacher. Desiring that his children should return home each Friday noon, he addressed her a note in which, in both what was said and in what was omitted, there was manifestly intentional discourtesy. No person wording the most formal business letter would have so indited it. Certainly it was not the style that should have been pursued by a gentleman himself formerly a school-teacher, and addressing a lady, the teacher of his children. The answer of the lady was no improvement upon the letter to which it replied. In it she denied the sufficiency of Mr. Beggs' reason for taking his children from the school Friday afternoon, and substantially denied his right to control his own children. In this she was simply but most painfully mistaken, and between the order of the father that the boy should come home and of the teacher that he should not, the boy had simply to obey his father. The action of the Trustees I am unable to approve. While I fully recognize the right as well as the duty of these officials to supervise and aid or correct the action of teachers as they shall deem for the best interest of the school, and while I should hesitate at interfering with the very large discretion with which they are clothed, except in the most palpable cases, yet neither in the mode pursued nor the conclusion reached do I think their action can be approved. I do not deem it necessary to discuss their course in detail. Suffice it to say, that before a child is summarily expelled from a public school, absolutely excluded from the opportunities for a public education, it should appear that he is not amenable to, nor reformable by, the ordinary and usual methods of discipline; that he is in fact incorrigible, and that the mischiefs likely to result to the school by his presence are greater than the benefits likely to be gained by himself. When such a case is presented, it is more than the right, it is the duty, of the Trustees to expel such a pupil, but in so doing, in a matter of such grave consequences to the party expelled, they should proceed with due deliberation, and upon the fullest investigation. The party should have a right to explain his conduct and to defend himself, and if it appeared that temporary suspension, or some other mode of punishment, will accomplish the desired result, the milder methods should be adopted. I do not think the course pursued in this case was in accordance with these views. I am unable to entirely excuse the conduct of any of these parties. In some stage of these proceedings all seem to have acted inconsiderately. I shall advise that the order expelling this boy be rescinded, and he be permitted to return to the school. As already stated, as both parties seem to have been about equally in fault, each party will pay their own costs incurred in this proceeding.

PEOPLE vs. JUAN EDSON.

CHARGE TO JURY. DELIVERED SEPTEMBER, 1885.

Gentlemen of the Jury,—The defendant, Juan Edson, is proceeded against for the crime of bribery, alleged to have been by him committed on or about the 17th day of February, 1885, in receiving from one Casimir Scossa the sum of $25 as a corrupt inducement to him in his official duty; that substantially is the charge of the information. The statute under which this information is filed reads as follows:

"Every executive officer, or person elected or appointed to an executive office, who asks, receives, or agrees to receive, any bribe upon any agreement or understanding that his votes, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, is punished," etc. That, gentlemen, is the section of the statute under which this information is filed, and the offense charged is, that Edson, as a police officer of the City of San Jose, received from one of these parties a sum of money to induce him to improperly influence his action as a police officer.

There are certain propositions in this case admitted or so conclusively established that they are not the subject of controversy; those I shall briefly state, so that you may understand exactly where the contested proposition in this case lies. It is admitted that the defendant Juan Edson during the month of February and at the time of these transactions was a public official, a police officer of the City of San Jose; that he was an officer of the class of those who could receive a bribe and render themselves amenable to punishment therefor; that upon that day or about that time, having a warrant, he arrested one Casimir Scossa, upon, as I understand the charge to be, that he was habitually living with a prostitute, or in a house of prostitution; a misdemeanor under the city ordinances, and I believe also under the statutes of the State; it was a misdemeanor, however, punishable by fine and imprisonment, for which a party could be properly apprehended; that upon the night in question the defendant Edson proceeded to the house of this Chona Felis, procured admission to it, there found this party, and apprehended and took him to the Police Office, where he was incarcerated, and remained until the next day; that upon the next day, or at some time shortly thereafter, Chona Felis gave to Juan Edson, the defendant, the sum of $25; that Casimir Scossa was not examined or tried for the offense for which he was arrested, but that a representation was made to Judge Pfister, the City Justice, with reference to his case, and he was released from custody. Those facts, gentlemen, I understand to be either admitted directly or not disputed, and you will have therefore no difficulty in approaching the real question at issue. Upon the part of the prosecution, Casimir Scossa and the woman, Chona Felis, were examined in your presence. They state substantially that the $25 that was paid by Chona Felis to Juan Edson was by them paid and by him received for the purpose of procuring the release of Casimir Scossa from the custody in which he was then held under the arrest made by Juan Edson and A. Castro; that Edson, in demanding from them this sum of money, stated in detail what it would be required for—that a certain portion of it was to go to the Judge, another portion to the lawyer, another to the complaining party, and another portion to Edson himself; that he insisted on receiving the amount of $25 and declined or refused to receive any less sum, and that they paid it to him for the purpose of accomplishing that end. That is their statement.

Upon the part of the defendant, Juan Edson and A. Castro have been examined as witnesses, and they testify that the $25 that was paid was given by Chona Felis to Edson for the purpose of paying for his services in the investigation of the estate of her sister, in which she thought she might have an interest; that the agreement was made that he should receive this amount as part payment, and that it was paid to him for such services. Both parties claim to have heard all that was said with reference to it, and to be thoroughly informed as to the agreement upon which this $25 was paid; it is unnecessary for me to say, gentlemen, that their statements are entirely irreconcilable, that there could be no misunderstanding or misconception with reference to it, that one or the other of these parties in this case must have committed willful perjury. It is for you, of course, to determine where lies the fact. If Juan Edson received this money from this woman, he understanding that it was a payment for his services in investigating an estate, he should be acquitted, for that he had a right to do, and it was no violation of his official duty ; if, upon the other hand, he received that money for the purpose of corruptly influencing him to release this party, or not to properly discharge his duty as an arresting officer with reference to him, he so understanding the purpose for which it was given and receiving it so understanding, he is guilty of the crime charged in the information and should be convicted. I have stated to you, gentlemen, the facts that were not disputed ; of course, as to the purpose for which this money was given and received there is a positive and irreconcilable dispute that you have to settle for yourselves. It is the duty of an officer charged with a public trust, whatever it may be, to faithfully, energetically and efficiently discharge all those duties as prescribed by law, or as fairly implied from his position ; and to receive a sum of money upon the assurance, or for the purpose upon his part understood, of being less efficient, less diligent, less active in discharging those duties than he otherwise would be, is to corruptly accept a bribe, no matter what he may do thereafter, however efficient or inefficient he may be in what follows ; if he receives the money with that as the understanding upon which it is paid, and that the understanding upon his part with which he receives it, it is a corrupt bribe, and he is amenable to the punishments and penalties prescribed by the statute. I do not know, gentlemen, that I can give you any more emphatic or explicit definition of what constitutes a bribe than that, if he received from a party charged with a crime, or a party against whom it was his duty to take official action in any way, a sum of money, or thing of value, with the understanding upon their part and upon his that in so receiving it he would be less active, less vigilant and less energetic in prosecuting them and bringing them to justice than he would be but for the reception of such thing of value, he violates his duty, is guilty of the offense of receiving a bribe. There is in this case, gentlemen, very little by which I can aid you. The contradiction is plain and manifest, and has to be solved by yourselves by the exercise of your own sound judgment as observing men. In this, as in all other cases, it is your right as well as your duty to take into consideration the appearance of the witnesses upon the stand, the probabilities or improbabilities of their statements, as they may suggest themselves to your mind—their reasonableness, their apparent consistency with each other—and judge from such comparison and such consideration where lies the truth. It has been argued, and very properly, before you, that many of the witnesses here are of a class whose existence in a community is to be regretted. It is proper for the jury to take into consideration the character, the vocation and the profession of witnesses as well as their appearance upon the stand, for two purposes. One is in the consideration of their credibility as witnesses ; and second, where the witnesses are shown to have been active parties to the transaction that is the subject of inquiry, you can consider their character, their profession and vocation, in judging of the probability of their being parties to such a transaction as has been detailed ; you can judge whether these parties would have been likely to offer a bribe to an officer, and in determining that, as a fact, you can judge of the character of a party who, it is alleged, made that approach. The fact that this offense for which Scossa was arrested was committed by one of this class does not excuse you from judging of their testimony or of the facts of this case as you would of any other case. It often happens that offenses of this and kindred character can be established only by the testimony of people of this class, and in many cases were we to wait until the more reputable of our citizens could be witnesses in cases of this character, very many offences must of necessity go unpunished. You have to judge, however, of these witnesses as they appear before you, as their character is established or believed by you to be, and the surroundings, the measure of credit that you will give them, and the conclusiveness or force or effect to the testimony elicited from them. You will not understand me, in any of the remarks that I have made as to the offense committed, as referring in any way to the defendant in this case. When I speak of an offense committed I refer to the conceded offense on the part of Casimir Scossa, out of which this present inquiry has arisen. As to the present charge, that is for you to determine from the facts as you shall find them established in the present case. The same rules as to the character or vocation of witnesses, and as to their credibility, will be applied where witnesses of this character have been called and examined in the present case.

In this case the defendant, Juan Edson, has been examined as a witness before you. This it is his right to be, and it is your duty to judge of his testimony as you do that of any other witness examined before you. Apply the same rules to the credibility of his statements, the ingenuousness of his testimony and his appearance before you, that you do to any other witness. It is proper, however, and it is your duty, to bear in mind his situation in this case, the fact that this is a proceeding against himself, and the manner in which he may be affected by your verdict and its consequences to himself, and judge whether that may not affect his credibility or color his testimony. In this, as in all other criminal cases, the burden of proof is upon the prosecution. The law presumes the defendant innocent until he be proven guilty, and that presumption attaches to every stage of the case and to every fact essential to a conviction, and must be overcome by proof beyond a reasonable doubt, establishing his guilt beyond a resonable doubt. But by a reasonable doubt the jury are not to understand every imaginable conjecture that an ingenious mind may conjure up; every fact dependent upon moral evidence is open to some fanciful doubt, but by a reasonable doubt is meant that state of the case which, after a full comparison and consideration of all the evidence adduced before the jury, leaves their minds in such a state that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge; it is something deducible from the evidence here produced, and from that alone, and upon the consideration of which the juror cannot say he is entirely satisfied of the truth of the charge. When that condition exists a reasonable doubt is presented, and the defendant is to have the benefit of it, and your verdict will be one of acquittal.

This, gentlemen, is the third day in which we have been engaged upon this trial. It is important in this as in all cases, civil as well as criminal, that there be an end of litigation; it is advisable that when a case has been fairly and fully submitted to a jury they shall come to a conclusion upon it. The interests of the people and of the defendant are subserved thereby. In order, therefore, that there may be no mistrial of this case, fairly and fully submitted to you, I shall offer some suggestions addressed to your procedure in the jury.room. It sometimes occurs, in a case that has been closely contested, that when jurors retire some member of the jury promptly announces his conclusion, and declares his purpose of adhering to that conclusion, that nothing shall change his opinion. That, gentlemen, is not an advisable course to pursue; by it the self-opinion of the juror is enlisted, his own arguments are received with less respect and he listens to opposing arguments with less patience and consideration. Avoid making any such premature and emphatic expressions of opinion until you have had a full opportunity of counselling with your associates; whatever your opinion may be, do not express it in too positive terms until such reasons and suggestions as your associates may desire to offer have been presented and fully estimated by yourself. You are not to abandon any opinion that you may entertain for the mere purpose of agreeing with your fellows, nor are you to obstinately adhere to an opinion that you may think no longer tenable simply because you may have once formed or prematurely expressed it. These suggestions that I make are that you avoid being too prompt and too emphatic in declaring a decided opinion until there has been a full and fair opportunity of a mutual consultation and comparison of opinions between yourselves. Acting, gentlemen, upon these suggestions, I make no doubt a conclusion will be reached to accomplish the ends which courts and inquiries of this kind have ever in view.

LAS ANIMAS CONTEMPT CASE.

DECISION RENDERED SEPTEMBER, 1885.

In the matter of J. W. Bane, upon an order to show cause why he should not be punished for contempt of Court, upon the 20th day of August, 1885, an affidavit subscribed and sworn to by A. T. Hermann was filed in this Court reciting in substance that affiant was one of the referees duly appointed and acting in the partition of Las Animas ranch; that while so acting he was, upon the 18th day of August, 1885, at the town of Gilroy, by Joseph W. Bane, interfered with, insulted and assaulted upon account of his official action as such referee. Upon this showing an order was made by this Court, directing the said J. W. Bane to appear in this Court and show cause why he should not be punished for contempt of Court in thus interfering with said referee. Upon this order said J. W. Bane appeared and, showing cause, was examined as a witness upon his own behalf. He testified that upon the occasion in question he spoke to Mr. Hermann as to the fact of certain parcels of the Las Animas ranch not having been surveyed, and also as to the fairness of certain valuations made by the referees. He says that after sundry questions and contradictions had passed between them Hermann said to him, "Bane, you are lying." or "What is the use of your lying in this way?" that to this, and resenting this remark as a personal insult, he slapped Mr. Hermann with his open hand. He further disclaims any intention of interfering in any way with the procedure of these referees, or purposing any contempt of the Court.

A number of witnesses were called and examined as to what passed between these parties. They differ somewhat as to what occurred and as to the use of the insulting phrase referred to. All, however, agree that the conversation began about as narrated by Bane; that it soon became a series of assertions and denials, characterized by increased asperity and feeling upon both sides; and several testify to the use by Hermann of the language to which Bane states he took offence.

Mr. Hermann denies that he used any such expression.

I deem it unnecessary to examine in detail or to critically estimate the relative values of this conflicting testimony. However determined, a very grave doubt could but remain as to the conclusion reached, and this condition of the evidence must, in my opinion, dispose of this order.

This is a summary and, when well taken, a severe proceeding, highly penal in its character and in its consequences, and punishable by fine or imprisonment, or both, at the discretion of the Court. In such a case the facts constituting the alleged contempt should be clearly and conclusively established; and although proof beyond a reasonable doubt may not be required in the strict sense of the term, still the proof should be cogent and convincing before the Court will adjudge the facts established.

If, however, from the conduct or actions of the party it appear that a contempt has been committed, the party cannot excuse himself by any disclaimer, however honest or earnest, of any intended personal disrespect, either to the individual who presides in the Court or of the officials through whom the Court is acting.

It is not alone that the dignity of the Court has been assailed that this power is set in motion. These considerations, however essential they may be to the procedure of Courts, are not the principal object to be attained. The ultimate and vital purpose to be secured is that there shall be a full, free and unrestricted examination into and determination of the rights of litigants. Any and all interference with this duty, whether it take the form of blandishments or of menace, whether it come with considerations of fear or favor, is alike pernicious, equally tends to disturb the sound, unbiased judgment which should ever characterize all judicial action, and is an unwarranted interference, against which the Court will protect its officials as it would guard itself.

In this case Mr. Bane seems to have inaugurated this conversation with an inquiry which in tone and tenor should have informed the referee that it was not made as an inquiry but as a complaint—that he was calling in question the action taken by the referees and censuring their course. To such an interrogatory thus rudely made, the referee might with propriety as well as dignity have declined to reply. For his official action he was amenable only to the rectitude of his purposes and the approval of his conscience, and he might well decline an altercation with a party whose interests compelled him to be biased and whose feelings would not permit him to be convinced. Against such a controversy he might well interpose his position, and if further pursued there would be little difficulty in ascertaining either who was the aggressor or what was the nature of the aggression.

It is not to be understood that to courteous inquiries intended to elicit information a referee may not with propriety respond, but between inquiries made for such purpose and those made as complaints and apparently intended to invite a controversy there is a very wide distinction. From the latter, whenever the purpose appears or such a result seems probable, the referee should promptly withdraw, and this he can do without any disparagement of himself, but as a matter of duty, as a course due to the dignity of the Court in whose place and upon whose behalf he is thus acting.

It does not *clearly* appear that the course pursued by the referee in this instance conformed to the views here expressed.

Let the rule to show cause be discharged.

SENTENCE OF JUAN EDSON.

DELIVERED OCTOBER, 1885.

Edson, stand up. With the disposition of these two motions nothing remains but for the Court to pronounce the judgment which the law declares in a conviction of this character. In my opinion the verdict of the jury was fully warranted by the evidence. The reasons for this conclusion I shall briefly state: If they impress others as they impressed me at the time, the soundness of that verdict, the righteousness of this conviction, can be called in question by no one. The testimony in the case shows that yourself and another officer repaired to the house of this woman Felis at the dead hour of night for the purpose of arresting her paramour, a very proper procedure where violation of law is being committed in subversion of public morals and public decency—not only for their apprehension, but punishment—that you found him in bed with her under circumstances that lead to no other conclusion in the world but that he was guilty and would have been found so on the presentation of the facts to the Court; that the next morning, at the magistrate's office, where Scossa was incarcerated, you presented yourself and received from this woman, or from Scossa, one in the presence of the other, $25, and immediately thereafter Scossa was liberated and went away; and that when the Court met on that day you called the Judge's attention to the fact that the case of Scossa was not as bad as that of the others and he should not be prosecuted further. The coincidence of your receiving this $25 from this woman at that time, in that place, and in that manner, and the immediate discharge of Scossa, cannot be overestimated; it is inconsistent with any other theory than that that money was then paid by these parties to secure his release; the fact that the woman had to borrow part of it, as she testified she did, and nobody disputes it—that she had to borrow a portion of this money shows that nothing less urgent than the release of her paramour could have induced her to make this special effort. Your statement and that of Castro that it was paid to you for your services as an attorney in looking up an estate of a sister who had died two years before in Napa, is to me inconsistent and incredible. This estate had remained at least two years without inquiry or investigation; it was not pressing at best, and the money which you say she paid you was but a part of that which you say you were to receive; that she should have made a partial payment upon so remote a contingency as that while her paramour remained in jail, that she should have employed your services at just that time in such an investigation, does not strike me as in any way probable. The jury took the same view of it, and I think very properly. All the coincidences and all the probabilities that I have been able to weigh and consider point to the fact that it was to relieve this man Scossa from the consequences of the criminal violation for which you had apprehended him that this money was raised by her and received by you. It would have been in my judgment a perversion of evidence for the jury to have credited to the so-called Napa estate the money which under these circumstances was paid to yourself; the woman and Scossa testified positively and in detail to the manner in which it was received, the discussion as to whom it was to be divided between, and to your insisting upon $25, and no less, being paid. I see nothing improbable or unreasonable in that statement. It is quite consistent with the course that had been taken, the course that it was proposed should be taken, and the course that was actually pursued. The verdict meets my entire approbation.

Sitting in this place a few years ago, I had occasion to pronounce a similar judgment upon a similar offender. I commented upon it then in terms that seemed to me befitting such an offense. I spoke of it as a very grave crime, made so not only by statute, but by the usages of society, by the necessities of the law, if you would have citizens understand that law is to be administered for the equal protection of all. In offenses of this character, it is not simply the officer that is debauched, it is not only the party who approaches him that is corrupted, but the community at large are instructed that their rights and the justice of their claims and the enforcement of law is not dependent upon an ascertainment of the actual right or upon an enforcement of the law, but upon the amount of money that the party accused may be able or willing to pay, the willingness of an official to receive it. The whole community is imperilled by such practices; officials corrupt one another by the knowledge that such practices can be pursued with impunity, and the whole community are instructed that it is cheaper to buy justice, to buy right, than to secure it by an observance of the law and by allegiance to its mandate. It introduces into our American system the vicious practices of Asia. In the case of which I have spoken the penalty imposed was not suffered. The executive clemency was invoked and the defendant discharged without suffering any part of the penalty imposed. Whether the penalty affixed by this Court was just, was merited by the offense, or whether the executive clemency was properly interposed, I do not propose to discuss. The law is still upon the statute books. Neither that judgment nor the interference of the Governor seems to have prevented a repetition of the crime. While that law stands, and viewing this offense as I do, as one of the very gravest character, one that should meet the reprobation of all, and for which no trifling penalty should be imposed, still, in view of this former penalty and the manner in which the public opinion was expressed upon it, I shall not impose a severer sentence, and can only hope that that and this admonition will prevent a recurrence of this crime.

The judgment of the Court is that you be imprisoned in the State Prison of this State for the term of two years.

PEOPLE EX REL. vs. JAMES AND KOCH.

DECISION RENDERED OCTOBER, 1885.

The facts conceded by the demurrers of the respondents in these cases show that upon the second Monday of April, 1885, J. W. James was duly elected Councilman of the City of San Jose, from the Second Ward of said city. That he duly qualified as such Councilman. That at the time of his election he was a resident of said Second Ward. That his term of office has not expired. That before the filing of this information he had removed from said Second Ward, and since that time has been, and still is, a resident of the Third Ward within this city. The same general matters are recited as to V. Koch, except that he was a resident of and elected for the First Ward, and has since removed to, and is now a resident of, the Fourth Ward in this city.

Upon these facts the relator asks that the offices of Councilmen so held by these parties be adjudged vacant.

The respondents demur to this information, and assign:

First.—That the Common Council has exclusive jurisdiction as to the election and qualification of its members.

Second.—That the removal of a Councilman from one ward in the city to another ward in the same city does not vacate his office.

In support of the information relator cites Section 3 of the City Charter, which reads as follows:

"Four Councilmen shall be elected annually—one from each ward—at the Charter election to be held on the second Monday in April, who shall be electors and residents of the wards in which they are chosen, and who shall hold their offices for two years, and until their successors are elected and qualified."

To the same proposition respondent relies upon parts of Section 6 and Section 9 of the Charter.

Those portions affecting this question read as follows:

"The Mayor and Common Council shall meet within five days after any election, canvass the returns and declare the result. * * * " (Sec. 6, City Charter.) "The Common Council may adopt rules for its proceedings; shall judge of the qualifications of its members. * * * " (Sec. 9, City Charter.)

Beside the sections of the Charter relied on by the relator he cites with confidence: People vs. Allen, 70 Penn., 455; People vs. Hall, 80 New York, 117.

In the Pennsylvania case it was held that where the office of a Councilman was declared by statute to be "forfeited if this official should be interested in any way in any municipal contract or should become surety for any city official," the fact that a Councilman did become surety upon the bond of the City Treasurer forfeited his office as such Councilman and that the power was inherent in the Courts to so declare.

In the New York case a very able opinion was filed by Judge Folger. In that case the statute provided that the Common Council should be judge of the qualification of its members, "subject to review by the Courts." The Court held that this jurisdiction in the Court was inherent in it by virtue of its general jurisdiction as given by the Constitution, and that the words of the statute, "subject to review by the Courts," were not essential to the exercise of this power.

The case from Pennsylvania may perhaps be reconciled with decisions in which this jurisdiction has been denied, and had the New York Court placed its decision upon the words of the statute, "subject to review by the Courts," that case also might be brought within this line of decisions. The reasoning of the Court, however, places the decision upon much broader grounds, and makes this jurisdiction inherent in the Court—not ousted by the fact that the Charter assumes to give it to the Council—nor in any way dependent upon the fact that the same section undertook to make it reviewable by the Court. This case is an unquestionable authority for the position assumed by the relator.

Upon the part of the respondent, and in addition to the sections of the Charter quoted, is cited Dillon on Municipal Corporations. Says this author:

"A constitutional provision that the judicial power shall be vested in the Supreme and inferior courts does not disable the Legislature in creating municipal corporations from providing that the City Council shall be the judge of the election of the Mayor, members of the Council and other officers, and from prohibiting the ordinary courts of justice from inquiring into the validity of the determination of the City Council." (Dillon on Municipal Corporations, Sec. 139.)

In support of this proposition Mr. Dillon cites some eight States, and nowhere that I have observed does he in any way qualify this statement.

With these the decisions without this State, the precise question was presented to the Supreme Court of this State in People vs. Metzger, 47 Cal., 524.

The proceeding there, as here, was by *quo-warranto* to determine the right of a party to the office of Councilman of the City of Los Angeles. There, as here, it was objected by demurrer that the matter was exclusively for the determination of the Council and that the Courts had no jurisdiction.

The Court overruled the demurrer and the respondent appealed. The Supreme Court, reversing the judgment of the lower Court, said: "When the Charter of a city provides that the Common Council shall judge of the qualifications, election and returns of their own members, the Council possesses the exclusive authority to pass upon the subject, and the Courts have no jurisdiction to inquire into the qualifications, election or returns of members of the Council." (47 Cal., 524.)

This case is in no respect distinguishable from the case at bar, and should be decisive of it.

It is insisted, however, that this case was "not well considered," and should, therefore, be disregarded by this Court. It is for this reason that I have examined the decisions of other States.

As before stated, this review shows these decisions to be conflicting, with high authority denying the jurisdiction of the Courts. It was with this the state of the law that the Los Angeles case was decided. The question was as to the jurisdiction of the Court to examine into the qualification of the Councilmen of one of the principal cities of the State, and this was the single question presented. The judgment of the lower Court asserted that jurisdiction. The attorneys who represented the respective parties were men of recognized eminence in their profession, one of them now a distinguished ornament of the bench before which he then appeared. The judgment of the lower Court was reversed upon the single proposition that the Common Council was the exclusive judge of the qualifications of its own members. I see no reason for supposing that a proposition of such character, thus presented and thus disposed of, did not receive all the consideration which should make it a binding authority upon all inferior tribunals.

Upon the propriety of the Court disregarding, and thus practically reversing, a clear and explicit decision of the Supreme Court, this latter tribunal over thirty years since made some significant remarks. Said the Court:

"We have never arrogated to ourselves any more learning than that possessed in inferior courts and by prosecuting officers, but it would be scarcely unfair to suppose that the united judgment of three men was sometimes equal to that of one, and if we mistake not the theory of our system of jurisprudence, the Supreme Court was designed as a tribunal of last resort to settle precedents, and its decisions are authoritative upon the Courts of this State, notwithstanding they may not meet with the approbation of others of more wisdom, learning and integrity than ourselves." (People vs. Bachus, 5 Cal., 278.)

With this admonition, I shall content myself with following, instead of presuming to correct, the law as expounded by the Supreme Court.

There are other views, however, of this question which lead to the same conclusion. They will be briefly stated. The "Los Angeles" case was decided in 1874. It then construed certain expressions as giving to the Common Council exclusive jurisdiction of these matters. This decision remains unqualified to the present time.

With this the interpretation of this phraseology, the Legislature in 1882, in the Charter of San Jose, repeated almost verbatim the language thus construed. The rule is a familiar one, that when the Legislature employs words which have been thus judicially construed, they enact the construction as well as the phrase.

Did not this objection to the jurisdiction dispose of the case of the relator, another difficulty is presented. The Charter nowhere declares what act or state of facts shall create a vacancy. It is only by implication that this, as a result, is to be deduced. That is, that as the Charter declares that the Councilmen are to be "electors and residents of the wards in which they are chosen," continuing residence is a continuing qualification, and that a change of residence creates of itself a vacancy.

Supported as this argument is by very apparent considerations of policy, it is not without weight. Unfortunately for this position, the implication is overcome by the unequivocal declaration of the same power which created the Charter. Says the Code:

"An office becomes vacant by the incumbent ceasing to be an inhabitant of the State; or, if the office be local, of the district, county or township for which he was chosen, or appointed, or within which the duties of his office are required to be discharged." (Sec. 996, Political Code.)

And again, "If any person elected to a city office removes from the city, absents himself for more than thirty days without leave from the Council, or fails to qualify within ten days after election, his office is vacant." (Sec. 4,373, Political Code.)

In these sections the Legislature have industriously and with apt words declared what shall constitute a vacancy, and in two separate sections have repeated this declaration as to city officials. This by familiar rules of statutory construction must be deemed decisive upon this question.

It is, however, insisted that the word "*district*," used in Section 996, should be construed to mean "*ward*" as well.

I do not so interpret it. The Legislature must be taken to understand the meaning of phrases constantly employed in statutes. In the very many charters found in our statutes, so far as I have examined them, I find the term "ward" employed as it is in the San Jose Charter, as a subdivision of a city, while in the same statute at least five, and perhaps more, classes of public officials are referred to as "district officials." Thus: Supervisors, School Trustees, Road Overseers, Reclamation officers and formerly Judges were classified and referred to as district officials.

I see no reason for assuming that the Legislature did not fully appreciate the existence of city subdivisions by "wards" and of other classes of "district officials" so frequently legislated for.

In my opinion the removal, during his official term, of a Councilman from one ward to another ward within the same city does not vacate his office. The demurrer of the respondent to relator's bill is sustained and the bill dismissed.

WILLARD LOTTERY CASE.

DECISION RENDERED OCTOBER, 1885.

The opinion, after citing the city ordinance prohibiting gambling, reviews the history of the case, showing that M. Willard, a tobacconist, was presented before a Justice of the Peace on a charge of conducting a lottery in offering premiums and prizes, which were drawn for by chance with tickets. A ticket was given to each purchaser of fifty cents' worth of goods. The particular charge was the sale of such a ticket to J. T. Porter.

The Justice dismissed the case after trial, without allowing it to go to the jury, and the people appealed. The opinion then proceeds as follows:

These are the facts as exhibited by this statement. For the people it is insisted that this scheme is a lottery, and this ticket a lottery ticket; while the defendant contends that the statute defines a lottery, and that this transaction does not come within that definition.

The section relied upon by defendant reads as follows: "A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or any interest in such property upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known." (Section 319, Penal Code.) This section would seem to be sufficiently comprehensive to embrace almost any arrangement through which a distribution by chance is sought to be effected. It is, however, insisted that the words "valuable consideration" employed in this section make it inapplicable to the facts of this case; that the entire consideration must be for the chance, and that the statement that the cigars were of the value of the fifty cents paid leaves nothing of value to be credited to the ticket.

The Legislature seem to have been of opinion that this section might be thus construed, and in a subsequent enactment provided:

* * * "Or who agrees to pay any sum of money or deliver any goods, things in action or property, or to forbear to do anything for the benefit of any person, *with or without consideration*, upon any event or contingency dependent on the drawing of any ticket in any lottery, * * * is guilty of a misdemeanor."

If we read these sections together, as we well may, a person may make himself liable for dealing in a lottery with or without any consideration upon his part. If they cannot be thus read and construed together the later section must control.

Clear and explicit as are these sections, they are no more so than is the letter of the Constitution which commanded their enactment. Says that instrument:

"The Legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale in this State of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery." (Section 26, Art. 4, Constitution.)

What then is a lottery, "or a scheme in the nature of a lottery," against which Constitution, statute and ordinance are thus arrayed? "A distribution of prizes and blanks by chance."

This is a comprehensive definition of this term as taken from lexicons, cyclopedias and judicial decisions, and it would seem as if a fact which can be thus simply and tersely expressed ought not to be beyond either the popular or the judicial apprehension. Nor does the difficulty lie in comprehending this term; it is found in the capricious legislation and the varying judicial decisions made upon this subject.

Lotteries, as furnishing an easy method of raising revenue by pandering to the universal passion for gambling, have been occasionally permitted, though the recognition that they were demoralizing and pernicious has generally induced their inhibition.

The passion created by the occasional permission has ever proved more potent than the general prohibition, and the gains which have followed from this practice were too great to be willingly relinquished; and thus tempted and thus trained, patrons and promoters were alike ready to connive at any attempt by which adverse legislation could be evaded.

It is in these efforts that the community has again and again been flooded with high sounding schemes, by which in the name of charity, of benevolence, of patriotism, of art, or of religion, some gambling scheme was to be foisted upon the public. The earlier decisions of the Courts favored these subterfuges. Educated in the maxims that all criminal laws were to be strictly construed, judges felt constrained to decide that the act which could not be brought within the strictest letter of the statute was without its purview; and through every loophole thus found in the adjudications there poured at once the flood which legislation was striving to repress.

At last a better appreciation of the subject obtained in the Courts, and the spirit which characterized the action of the Legislature found its reflection in the language of the judges. The trammels of the earlier adjudications were cast aside, and the Courts declared that laws were to be construed according to their meaning, and enforced according to their spirit; that Courts were not to be hoodwinked by palpable subterfuges and fraudulent evasions; that acts and facts to which the common sense of the community gave one universal meaning, deduced but one conclusion, ought to, and should, receive the same interpretation from all intelligent men, whether on or off the bench. This is the spirit, in many instances the language, of approved decisions of Courts of the highest standing—Dunn vs. People, 40 Ills., 465; Thomas vs. People, 59 Ills., 160; Hull vs. Ruggles, 56 N.Y., 425; Bill vs. State, 5 Sneed, 507; Bishop, Crimes 2, 945, 946.

Thus interpreted, the statutes, always ample, were made efficient, and gambling devices which masquerading under high sounding names proposed for their patrons anything, from the extinguishment of the National debt to the distribution of prize packages of candy, were relegated to their true position, that of plain violations of the criminal law.

Against the authorities above referred to, defendant's counsel cites the case of Kohn vs. Kohler, 18 N.Y. Reporter, 179. In this case the statute of the State of New York permitted the party who had purchased any ticket or interest in a lottery to recover from the seller twice the amount he had paid for the ticket, or interest and treble costs. Kohn sold to Kohler a bond of the Austrian Empire for one hundred guilders. With this bond went a chance by which the holder might acquire a prize at a subsequent drawing to be had in Austria. The apparent purpose of this chance feature of the bond was, of course, to make the bond more salable. Kohn, the purchaser of this bond, sued Kohler, the seller, to recover the penalty provided in the statute. The Court held that this was not a lottery and gave judgment for the defendant. The opinion of the Judge in this case is more labored than satisfactory. The case was apparently one of hardship as against Kohler, and the decision is an apt illustration of the maxim, "Hard cases make bad law."

With the readiness with which such decisions are always availed of, it is not easy to see why the debt of Cuba could not be foisted upon this country as an adjunct to the Havana lottery, or why the obligations of the Austrian or Russian Empires might not with equal success perform a similar service.

If past experience teaches anything, New York will soon be called upon to interpose another legislative barrier to the inviting avenue thus opened by the Courts.

Returning to the admitted facts of the present case, and in what respect is it wanting to the full description of a lottery?

The party purchasing is to receive a ticket—and judging from the number of the one sold to Porter, at least 1,842 of these were issued. There is to be a drawing of numbers—an unmistakable appeal to chance. There will be seven prizes of varying value given to the holders of the seven numbers that chance to be drawn. There will be 1,835 blanks. Is there a single quality of a lottery wanting in this scheme? Is there one person in this community who has attained to years of discretion who does not know that a transaction thus characterized is a lottery—is the thing prohibited by Constitution, statute and ordinance?

As was said by the Supreme Court of this State: "This is the view that would strike any one off the bench. We know of no reason why we should not enjoy the privilege of exercising a little common sense and take the same view of it." (People vs. Cowell, 60 California, 402.)

It is earnestly insisted by defendant's counsel that this is but an ingenious method of advertising and thus increasing business. The fact that this may follow as a result in no way changes the character of the means employed, and as we construe this act it is an unmistakable effort to dispose of property by chance, with a transparent attempt to evade the law which prohibits such disposition. It was in the attempt to recognize such distinctions that the earlier

Courts were entangled, and speedily found themselves confronted with practices which they could not excuse; while embarrassed with precedents which they could not avoid. In later days the Courts, more fearless, and, in my opinion, better instructed, have ignored these baseless distinctions and cut through these palpable subterfuges.

It is further argued that to hold this defendant liable is to deny to a party the right to give away his own, whatever may be the motive that incites to this generosity. This difficulty is not, in our opinion, insuperable.

This defendant, or any person similarly inclined, may give to his patrons or any other person anything he may possess without limit or restriction until his generous ardor is entirely appeased. He may bestow as he will without limit or fear, but he may not make of his bounty a lottery, of his gifts a gambling scheme. With this distinction clearly understood, the difficulty suggested by counsel may readily be avoided.

It is further suggested that the construction here contended for will diminish the success of church fairs and horse races. Of course we cannot know that practices prohibited by the law obtain with either of these institutions, but were that the case, and should such a consequence follow, however much we might deplore the result, that regret could not excuse us from interpreting and enforcing the law as in this case we read and understand it.

In conclusion we repeat: That under the law of this State "any distribution of prizes and blanks by chance" is a lottery and is prohibited. The stipulated facts bring the present case fully within this definition. The action of the Justice of the lower Court does not conform to these views. The judgment appealed from is reversed and the case ordered upon the calendar of this Court for trial.

CHAPTER XVII.

SENTENCE OF NELSON PIERCE.

DELIVERED NOVEMBER, 1885.

THE circumstances of this killing, Mr. Pierce, have little to palliate, and nothing to justify. The verdict of the jury which found you guilty of the offense charged, and which also fixed the penalty, was perhaps as liberal and as lenient as you had any just cause to expect. The peculiar circumstances under which you are present in this Court seem to me an occasion eminently fitting for the Court to refer not only to your antecedent character, but the circumstances under which this homicide was committed. According to your statement, the deceased, Joseph A. McCarthy, was committing an assault on you with a pistol, by which your life was in danger. For the purpose of protecting yourself against great bodily harm, or against death, you claim that you slew him. The testimony in this case shows beyond a doubt that the necessity for his death did not exist. According to your own statement, at an earlier hour in the evening a quarrel, a contest between Joseph A. McCarthy and yourself, had occurred—both of you being intoxicated—at a place, a vile place, in town; that in the former contest you were easily the victor. Joseph McCarthy was thrown from the saloon. You had no difficulty in not only repelling any assault he would make, but in absolutely disarming him and holding him helpless in your power. You returned to the saloon in which this difficulty had occurred and took your station on the counter, and awaited whatever might follow. You claim he came back armed with a pistol, which he thrust into your face, and that by it your life was in peril. The prior contest you had with this man had demonstrated beyond a peradventure his physical inability to cope with you. The few moments that elapsed between his going out and his return showed that his physical condition had in no way changed as to your relative capacity to attack and resist. You seized him and threw him on the floor, and according to your own statement, held in your left hand the pistol you claim he returned with. The pistol was not discharged; there was not a cap snapped. There is no evidence that there was any attempt made on the part of McCarthy to even discharge the pistol. You had already demonstrated your capacity to overcome him. According to your own testimony, with the pistol held in your left hand, he was absolutely powerless. It would have been magnanimous, it would have been fair, even were he the assailant, thus helpless and thus hopelessly in your power, for you to disarm him, and perhaps to have visited a castigation upon him as much as the assault would have merited. You did nothing of the kind. He was as helpless in your power as though he were manacled, as though he were handcuffed, with gyves on his wrists. You drew a knife, as murderous a looking weapon as ever appeared in a Court of Justice, one that seems to have been your constant companion, and stabbed him sixteen times; thirteen times in the back. Not a shot was fired. You emerged from the scene of the contest without a scratch, without the slightest signs that would betray your participation. He was killed as brutally, as murderously, as purposely as though he had been tied to a stake and stabbed to death by you. Those are the circumstances of the homicide.

Had there been but a single blow given in the fury of your resentment, had your antagonist been your physical equal, had his pistol been fired at you, had you not already shown your ability to master him alone without adventitious aid. had you retreated and he pursued you with the weapon, in brief had you not had him powerless, helpless, in your grasp, there might be some plausible pretext for the act, some excuse to be urged in defense. There is another matter to which I shall animadvert. Had you not carried this murderous weapon, and had it ready for any encounter, any controversy that might present itself, McCarthy would have been alive, and you to-day would not be answerable to the bar of justice for this crime. There is another circumstance in this case that calls for comment. You are a young man, according to the statement of your father, 24 years of age, born in this State, a resident of the metropolitan city of the State with hundreds of thousands of inhabitants, to many of whom yourself or your father's family must have been known. From this community that have known you from childhood there comes but one voice, but one declaration as to your antecedent character, and that is that it is as bad as it can be. If the question asked by the District Attorney, if you had not been before the Criminal Courts thirty-one times on criminal charges, had been answered affirmatively, what a retrospect of crime for one of your age. The objection of your attorney prevented the answer to that question. That is a fearful record for a young man of 24 years of age; thirty-one times before the Criminal Courts of his country. That is a fearful thing for a young man in his youth. Cannot one be found in the whole length and breadth of the State to show you have a character that gives countenance to your assertion in this case, to support your credibility; a character that renders you incapable of a heartless, cruel murder? I have upon a great many occasions taken the opportunity to comment upon this question of character, and I repeat it here, not for your benefit, but for the benefit of those that may be walking in your footsteps, but have not yet reached that goal. Good character in a case like the present is like the shadow of a great rock in a dry land. It is that defense that a man builds up by simple obedience to, and quiet observance of, the laws of his country. It goes with him and stands with him in his hour of peril, and is not invoked unsuccessfully when the peril calls for its presence Had you been able to produce such a character here; had a dozen men—nay had one man been found to testify that your character was above reproach, and that you were truthful in the past and could be believed in the present, the palsy that silenced your lips would not have rested upon them. Not one of them to thus testify. No good character could be presented in response to your urgent need; but bad character came in and beat you down in this your hour of danger. I warn young men, if they thus recklessly pursue the course you are pursuing, that the bad character of yesterday, of last month, of last year, when the time of trial comes, will assert itself and come with redoubled force on the man who builds it up against him.

In this case the jury, perhaps considering your youth, and considering the place in which this controversy occurred, have not affixed the extreme penalty of the law. It was a place where the vile resort, where besotted men and the lowest women consort, those not fit to be named before decent people; a place of universal reproach, of common reprobation; and yet such places according to all this testimony were your constant resort. Week in and out your life was passed among such associates. They were your companions, and their practices were yours. This verdict of the jury rendered against you thus early in your youth is probably less severe than it would have been had your career in this community been much longer continued. For a life with such antecedents it requires no prophecy to determine the result. It is the State Prison, with all its disgrace, with all its punishment. It is scarcely more severe to be condemned to the gallows. For a career thus characterized, reformation could not be hoped; nor could the community well risk its chances for a life that thus endangers every man with whom it is brought in contact. There is little that can be anticipated; there is little that the community can hope for. As I have already stated, the jury in this case has fixed the penalty, and as leniently as the circumstances of this homicide could permit. It becomes my duty to renew here the decision returned in the verdict.

The judgment of the law is that you be imprisoned in the Penitentiary of this State for the term of your natural life.

CHARGE TO THE GRAND JURY.

DELIVERED DECEMBER, 1885.

Gentlemen of the Grand Jury,—You are now empanelled as the Grand Jury of this county, a tribunal invoked but once in each year, and which in my opinion has very grave and important duties. It has become a somewhat popular notion that the Grand Jury system is obsolete; that it is an antiquated affair, and of but little importance, and that your convocation is a mere formal matter. With all such criticisms I have no sympathy and take no part. The Grand Jury system, as I understand it, and as it exists at present in this State, is a very ancient institution; it is co-existent with English law, as far as we have any record of it, and has been preserved by all English-speaking people, in all past time of which we have historical record. It is retained in England at the present day, charged with the gravest responsibilities, and looked upon with the highest respect. In every State of the Union, I believe, it is retained, and is an important adjunct of our Federal jurisprudence; in fact all cases which are prosecuted in the Federal Courts must be initiated through the intervention of a Grand Jury, and the Constitution of the United States has sedulously preserved this institution as a part of our Federal system. Thus ancient, thus honored, and thus preserved, we may well look to it as an institution to be respected, to be retained; one in which the people will expect to have their important rights subserved, and by which important duties are performed. I make these preliminary suggestions in order that no member of the Grand Jury or any citizen of the county may belittle or underrate the important organization present before me. Originally, as part of the criminal system of this State, all offences of a public character had to be prosecuted in courts through the intervention of the Grand Jury; by the new Constitution under which we now live that power has been in part devolved upon another officer of the county, the District Attorney, and considerations of economy and dispatch commend the change thus made. In, however, imposing upon him the duty of presenting criminal offenses the Constitution has not withdrawn nor proposed withdrawing from the Grand Jury the right to act upon such cases whenever they deem an exigency calls for action, and doubtless one of the principal considerations of retaining this body was that if there were any dereliction on the part of any officer, any causes which, in the judgment of this body, should have been presented that have been neglected through any misapprehension, any favoritism on the part of any official, it may find here a prompt and swift and ready correction, so that you are instructed that in any criminal case that shall be brought to your notice, the fact that the District Attorney, Justice of the Peace, or other officials of the county have not acted upon them is no bar or obstacle to your taking them up and dealing with them as matters of original jurisdiction, and in some manner presenting them to the consideration of the Court.

In the present instance, and at the present time, I understand that there are no parties in custody awaiting the action of the Grand Jury. The District Attorney has very properly availed himself of the power vested in him to provide for such cases by presenting informations, and so far as he could to relieve you from the labor and the burden of examining witnesses and presenting offenders in the way of indictments. The fact that he has done so, or attempted to have so done, will not, however, prevent your making any investigation as to any criminal matter that you think a proper subject for the cognizance of Courts, and if in any case you should be of the opinion that, through any dereliction on the part of any officer, there has been any omission in this regard, it is not merely your right, but more, it is your sworn duty, to supply that defect and that deficiency by presenting those parties through an information or an indictment. * * *

Besides the criminal duties that may devolve upon you, a very important duty is the examination and investigation of public affairs of the county, as discharged by the public officials, our servants. These officials, and the manner in which they discharge their duty, particularly those who may have to deal with the finances of the county, are a subject which it is an imperative duty of the Grand Jury to take into most careful consideration; not that I am aware of or have had it intimated that the present officials of the county are in any way wanting in the discharge of their duty, but the knowledge that a body of this kind may be called upon at any time to examine into their conduct, to look into their books and see the manner in which the public affairs are administered by them, will be a most wholesome admonition to them that any dereliction is liable to lead to detection, exposure and punishment; it is consequently important that you examine into the manner in which these different officials are discharging their duties, which may be done by committees.

The Judge also calls attention to public buildings and institutions, requesting the Grand Jury generally to go and examine them, and suggests that they request members of the Committee of the Board of Supervisors having that in charge to accompany them, giving them the benefit of their experience and observations.

There is one other suggestion I desire to make, and desire you to give it particular thought, and if it shall strike you as a consideration of the same importance as it has myself, you will take action in the manner that I shall indicate. It is not merely the right and duty of the Grand Jury of the county to attend to the direct interests I have specified, but it is their right, as well as their duty, to look to the general interests of all the people of the county. Drawn as you are, you represent every section of the county, you represent every interest, and I recognize among the gentlemen before me those who largely represent its character and the financial portion of its population. The questions that I have thus far suggested to you are largely financial; they exist largely in the manner in which public officials have discharged their duties. There is another question in which the interest of every citizen of the county may be very largely involved, and which may quite possibly acquire a magnitude that would justify my now presenting it to your consideration. It is believed that the cholera that has ravaged during the last year Europe and a portion of Asia is very liable to visit this Coast during the coming year. It is thoroughly understood by scientific men that sanitary measures which precede the advent of this scourge greatly mitigate its severity and sometimes wholly avert it; there can be no more vital interest to the people of the community than the health of the citizens; the cholera or any kindred plague which should chance to visit us may find its victim in every community, in every family. You may be called upon one year hence to regret most profoundly not to have taken measures now, that may appear to have been effectual. This is a matter of which the different communities of the East have taken, and are to-day taking, the most active cognizance, and are suggesting and pursuing the most sanitary measures, cleaning up the city, disposing of the sewage, and providing, as far as they can, against this scourge. In many localities a Health Board is organized whose duty it is to make constant investigations as to causes in which this disease may have its origin or in which it may find a hot-bed for its increase. Such a Board it is the power of the officers of this county, upon proper suggestion, to appoint here; its jurisdiction is co-extensive with the county to the most remote portion of it; wherever the causes exist that should be removed it is understood that this Board will investigate and take such action as will accomplish the result and remove such impurities as will lead to the evasion of this plague. It so chances that within the present year two of the principal cities and towns of the county have been taking active measures with reference to their sewage, and sanitary questions arising from the manner in which this sewage is distributed may well call for prompt action on the part of the officials of the county who are charged with this duty. It, of course, is not any part of the power or any part of the duty of the Grand Jury to inaugurate or direct any system of purification. You have nothing to do with the sewerage of any portion of the county, and nothing to do with the removal of nuisances which may be productive of plagues or likely to lead to diseases, but a suggestion upon your part to the Board of Supervisors, and a report calling attention to any particular danger or to the possibility of any imminent danger in the future, would be accepted as the voice of all the people, which would be regarded by them as an intimation that they would be upheld and countenanced by public opinion in such expenditures and such course as might possibly measurably protect this community from the apprehension of this dreadful disease. I therefore, gentlemen, call your attention to that possible visitation of the cholera to the Coast in the near future, and the fact that if any citizen of the county, medical gentleman of the county, or any citizens call your attention to any particular nuisance, any particular filth, or any particular place from which disease may reasonably be apprehended, that if in the form of a report you call the attention of the Supervisors, public officials, to it, they may take such preventive measures as they may deem advisable. It may be that an expenditure through the appointment of a special Health Inspector to make some supervision of sewage may accomplish very important results. You can instruct yourselves fully through the opinions of medical gentlemen, scientific gentlemen, as to what measures may be best taken, and I make no doubt your suggestions to the Board of Supervisors will be received and acted on as though the people of the county in their collective capacity had recommended such course.

I think, gentlemen, of nothing further for your instruction or for your guidance as to the line of duties that are either incumbent upon you or that may with propriety be acted upon by you. Your duties are very broad and large and elastic. You are the people of the whole county assembled here in a representative capacity, and whatever you do and the manner in which you do it will be recognized as the action of the citizens at large. I make no question that in the discharge of these duties, gentlemen, they will be so performed that those whom you represent will with entire confidence accept your action as that which is for the best interests of us all. With these suggestions, thanking you for the attention with which you have received them, I commend you to the discharge of your duties.

SENTENCE OF CAMPBELL AND LYONS.

DELIVERED JANUARY, 1886.

The sentence that I have to pronounce, and the remarks that I shall make, will be applicable to both cases.

There is probably no duty imposed upon a Court which of itself entails a greater measure of responsibility, or more anxious consideration upon the part of the officer who pronounces the judgment of the law, than this matter of criminal penalties. Under no circumstances, probably, are the parties that are presented for the judgments of the Courts amenable or accountable in the same exact measure of moral responsibility; the fact of the offense is but a minor matter for the consideration of the Court; the character of the offender, of necessity and in justice, must and does enter very largely into it. In pronouncing therefore judgments upon men charged with identically the same crimes it becomes the duty of the Judge to inquire into the antecedents of the party, to judge of the temptations under which he may have acted, to assume, so far as it is given to human mind to do, the probable effect of imprisonment upon him, the hope of subsequent reformation, and all that goes to make up the individual characteristics of the man; these of necessity are just as variant as the character of man can be, and to omniscience alone is it vouchsafed to admeasure the exact modicum of punishment that should be meted out to each individual. With such limited lights, however, as the Judge can obtain, and with the best efforts upon his part, the law invests him with a very large discretion, to be guided by all these circumstances in its exercise. To each individual case it must constantly happen, not as the result of chance, but of the most profound and anxious consideration, that judgments, apparently the most unequal as to terms, are pronounced by Courts against what appear to be the same offense and the same grade of offenders. I simply make this statement in justice to Judges, that when the discretion vested in them by law is properly exercised sentences as to terms will rarely seem equal—there must be all these varied considerations estimated by the Court and applied to the individual case. That much for adult offenders, but when boys like these now before me are presented to the Court, the responsibilities of the Court become very much graver, the considerations that weigh upon it very much more pressing and important. In this instance I purpose making some general suggestions; whether my judgment be sound or not, whether or not it be approved, the reasons which have guided my discretion shall at least be understood and estimated by those who may deem them worthy of consideration. The penal laws of this State, so far as they affect the protection of property, are exceptionally severe; many offenses which in other communities are graded as petty larcenies and treated as trifling misdemeanors are here classed as felonies and are punished as such. Take, for instance, the case as it stands upon the statute books, a person who enters a shed or a barn "with intent to commit larceny," as we read it in the statute book—there is nothing that impresses the superficial observer as peculiarly striking or wrong, and had the legislator who framed this law understood what it included, or had he read it as it has to be construed by the Court, that the boy who walks into a barn or slips into a shed to steal an apple is to be convicted of a felony and sent to the penitentiary, could he have understood that this was its effect, or operation, in my judgment no such law would have found its place upon the statute book. This is the law though that the Court is compelled to apply. This is the manner in which it is laid before the committing magistrates and judges, shocking in its barbarity and revolting in its severity. There is scarcely a man in the community that would not, could such a law have been applied to his own youthful indiscretions, have been consigned to the penitentiary. I simply state this to show the situation in which Courts are placed by cases of this character, and to justify the conduct of committing magistrates when boys are brought before them in resorting to any measure or any means which humanity can suggest to avoid such revolting consequences.

I am glad to know that in most instances—I judge at least from the cases that come before me—the committing magistrates of this country are not devoid of humanity, and that when a party of boys, led on perhaps by some old offender and impelled by an exuberance of youthful spirits or sudden temptation, walk into a shed and take an apple, or pick up a cake in a bakery, or commit some trifling depredation, for which some slight castigation would be abundant penalty, they find it a proper case for judging that the criminal intent was wanting and send these boys back to their homes, to the admonition of their parents, with a warning of the danger they have thus undergone. I approve the course of committing magistrates in thus administering this branch of the law. I should certainly criticise them were they not to give it such a construction. It is a fact that every other day, before the committing magistrates of this county, and sometimes in this Court, boys are brought that are no more amenable to criminal acts of this character than would be the merest infants, and so it is that so far as the Courts can they as wisely as well and humanely, in my judgment, so construe the law as to save these boys from these severe provisions and from the consequences of a mere youthful folly. I say this in order that these magistrates may at least understand the commendation which their course receives from me. Whether it shall be approved or disapproved by others I do not know, it would be a satisfaction to them and a pleasure to me to know that the sentiment of the community was with them; the proposition is none the less correct, let who will approve or who may disapprove it. There is, however, another class of offenders, boys too, that are brought before the Courts to whom these considerations cannot apply; unfortunate, to be commiserated by every one, their misfortunes still cannot shut the eyes of the Court either to their situation or as to the manner in which the community, on the one hand, is to be protected, or they possibly reclaimed. I refer first to a class of boys, incorrigible in themselves, who by repeated appearances in criminal courts, and constant and persistent depredations, show that they are not amenable to the ordinary influences by which offenders are to be reformed; their constant appearance in the Police Courts, their frequent citation before the higher tribunals, charged with grave offences, show that some other course must be taken if society is to be protected or they are to be reformed. Incorrigible perhaps for causes for which they could not be blamed, for hereditary influences which may have come through long generations of criminal ancestors, from pernicious surroundings from which they cannot free themselves and no one lends a helping hand to free them, they are none the less depredators upon the community, those from whom the criminal classes are recruited and against whom society must be protected until death shall at last free the community from these worthless criminals. For such boys the same measures and the same means of penalty must be awarded that there is to older offenders; it is their misfortune, perhaps, but the community cannot be compelled to share it with them. There is another class of offenders that must also be considered, boys not of necessity incorrigible and not perhaps naturally perverse, but whose unfortunate surroundings are such that they have been led astray by the influences and companionship of those who should have taught them better and guided them into ways of rectitude and right; these boys are to be protected against their personal surroundings and may make good citizens thereby. For them other communities establish reform schools and withdraw them from these pernicious associations until better habits are formed and sounder principles are established. In this State, unfortunately, there is no such institution, and these boys, who may have in them the future of useful men, must be protected by the action of the Court against these vicious surroundings and evil influences. How is this to be done? There are two means in the hands of the Court, though but one act which it can perform. It can send them to the penitentiary. This seems cruel. It is harsh, it is to be deplored, but it is all that the Court can do; shall the Judge send these boys, that are thus unhappily associated and surrounded, there, and for a short term or for a long one? This is the question presented by the suggestions of both the gentlemen who have addressed the Court on behalf of these two unfortunate boys. It is here that the Court's conduct is most frequently misjudged and its reasons misunderstood. I propose now to state my reasons. For a boy that is either in his domestic or in his social surroundings badly associated, that is, living among thieves, associated with those who either wink at his derelictions or even perhaps share with them, for such a boy there is no help as long as those associations continue. If he is sent to the penitentiary for a term of one or two years, while there he is restless, discontented, the habits that have been formed from perhaps many years of vile associations are only interrupted, they are not broken off, and in a very few months, with the credit which good behavior entitles him to, he is back again in all his former surroundings. If his parents were vicious then, they are vicious now; if he was a boy then, subject to their control and taking his direction from them, he still takes it from them; he is neither emancipated from their control nor disenthralled from his vicious antecedents and his wicked associations, and he comes back and finds all his former companions just as he left them, or but a step further on the road to the penitentiary, and welcoming him as he returns to the same beaten track, no new habits formed, all his old associates and all that can pervert just as he had left them.

The few months of his enforced absence has been simply the anticipation of the day that he should return to his former haunts and associates. This is the effect of a short term. What is the result of a long one? In the State's Prison, as I know, as a matter of observation as well as of inquiry, to the very best that the officers of that institution can do, they make of it a reform school for boys; they only associate with the older and hardened criminals during the hours of work, when conversation is prohibited and association limited so far as those officers can possibly restrict it; during the hours of recreation, Sundays and the like, they are kept by themselves, they neither talk with older criminals nor are they permitted to associate with them; they are taken under the especial supervision of the officers and of the moral instructor, and in every way and in everything that those officials can do they inculcate habits of industry, of good order, and urge the necessity of reforming and becoming good citizens when they shall once more return to the world. It is popularly understood that they are taken to the penitentiary and turned loose with a horde of murderers, burglars and outcasts, but that is not true. Just as far as the facilities of the place enable those officers to make it reformatory, they make it so; and as the result of personal experiment, of much thought and of anxious consideration, I find that long terms are far more advantageous to boys thus circumstanced than short terms can be. They are taught trades, they are entirely weaned from their former associates, and when restored to liberty they have outgrown the influences, parental or social, that have thus far perverted them; when they come back, if they do return to their former home, they find that their former associates have advanced so far in the grades of crime and worthlessness that they no longer even wish to associate with them, and those that are coming after are not congenial companions for them; a new road is open to them, a new life is before them, and they become practically reformed men. Without citing instances, I can only say that there are cases that have transpired in this Court again and again in which precisely this result has followed from long terms which this Court has imposed, and precisely the converse when, in a mistaken spirit of humanity, it has given to boys, because they were boys, a term of but a few months or a year or two in the penitentiary. It is guided by this experience, and in a spirit of kindness to those boys that cannot be over-estimated, that the judgment that this Court will pronounce is measured, and I have to say in imposing it, that in this instance, as in all others where it has been my duty to pronounce such a sentence, it will be not only my duty but my pleasure, whenever I shall find, or shall believe, or those that associate with these boys can assure me that they are indeed reformed, that the kindly object that I have in view has been accomplished by their incarceration, there is no effort that I can make that will be left unmade, no representation that I can urge that will be withheld, nothing that I can do that will not be done to relieve these unfortunate boys from the penalty now imposed, and from the incarceration which I deem absolutely—indispensably necessary to their reformation. I place myself on record as ready at any and all times, not only to see that the primary purpose which I have in view with them is accomplished, but to make every exertion in my power to relieve them, when that is accomplished, from the further consequences of the judgment I am constrained to pronounce.

WALTER LYONS.

In the case of this boy, Walter Lyons, I do not, I shall not, assume that he is incorrigible. I know, and the community know, the hopeless surroundings under which he was brought into being and by which he has been environed from his earliest infancy; they are deplorable, and, comparing his condition with that of the more favored boys of other citizens of the community, he is entitled on every hand and from everybody to the utmost commiseration and sympathy. I judge him by his unfortunate surroundings, as one that to be reformed must be separated alike from the mother that bore him and the companions that thus far have associated with him, or his road to destruction is certain and sure; and in that spirit of kindness, seeking to emancipate him from the bonds that he cannot break himself, I pronounce the judgment that is to relieve him from them, and, I sincerely hope, to return him to the paths of usefulness. The judgment of the Court is that he be imprisoned in the Penitentiary for the term of five years.

CALVIN CAMPBELL, JR.

In the case of this boy, Campbell, all these remarks are, in my judgment, equally applicable. The officers of this county have laid before me his record from the Eastern States to this shore.

I shall not comment upon what may have misled him, what malign influences may have guided this child from his birth to the present day. I can only say that unfortunately, or unhappily, or weakly, those that should have guided his steps and kept him in the ways of honesty have proven unable to accomplish this, however willing they may have been; in every city of which he has been an inmate, he stands recorded upon its criminal calendar, every town he has visited he has visited as a plunderer; the same rules that separated this Lyons boy from his hopeless and unfortunate surroundings must apply to this other boy. For the same reasons, and with the same declaration that, when found reformed, no effort upon the part of the Judge presiding in this Court will be spared in his behalf, the same judgment is pronounced in his case, that he be imprisoned in the Penitentiary of this State for the term of five years. Mr. Clerk, enter the judgments.

HICKEY vs. HICKEY.

DECISION RENDERED JANUARY, 1886.

This is one of those most unfortunate cases which seems to imperatively demand special and exceptional action upon the part of the Court. These difficulties will be best appreciated by a brief summary of the facts.

In 1857 plaintiff and defendant intermarried, and the same year took up their residence upon a tract of rough, uncultivated land, for which there was paid $800. Upon this tract they have ever since resided, and there have been born to them nine children, seven now living, the youngest about twelve years old. The tract of land occupied by these parties contained about 140 acres, and the defendant, aided by his wife and his older children, by patient toil and industry, has so improved this land that it is now of the value of about $14,000. There is other personal property of the value of between $1,000 and $2,000, making the entire property worth about $16,000.

All of this is community property; neither of these parties have any separate estate. The character of this property is such that constant and intelligent labor and skill are required to make it productive. The children of these parties are shown to be industrious and thrifty, and most of them reside with their mother upon the farm, and assist in its cultivation.

In his earlier life the defendant was, as I have stated, industrious and thrifty, but for the past ten years he has fallen into habits of inebriety from the use of alcoholic liquors; and for the last few years has been a confirmed drunkard, incapable of properly managing his property or conducting his business. With the formation of this habit, and when under the influence of liquor, the defendant is in the constant habit of using the most vile and insulting language to his wife and to his elder daughters, now young ladies, accusing them of shameful immoralities, and this in the presence of all his children, the younger as well as the older ones. No grounds whatever are shown for these accusations.

The plaintiff appears to have been as faithful in all her relations to the defendant as she has been patient and long-suffering under his persistent insults and abuse, and the only explanation for the defendant's misconduct is the change produced in his character and disposition by his intemperate habits. To whatever attributed, however, the consequences to plaintiff are alike distressing, and such as no wife should be required to endure.

The divorce asked for will be granted upon the ground of extreme cruelty.

As to the disposition of the common property, where, as in this case, the divorce is granted upon the ground of extreme cruelty, the Code provides: "The Court shall assign the community property to the respective parties in such proportion as from all the facts, and the condition of the parties, it shall deem just." (Section 146, Civil Code.)

The character of this property, the mode of its acquisition and enhancement, the management required to make it all remunerative, have been already stated. The facts of the case and the conditions of the parties made by the Code controlling features for the guidance of the Court are, in the matter now under consideration, factors of the greatest import.

Upon one hand a property which represents the industry and accumulations of the best years of this man's life, and in which should be found the provision for his declining years—a wife who has shared with him in all these labors and these expectations—seven children reared and nurtured by this once kind and considerate father—and upon the other hand a man over whose head fifty-eight years have passed, and left him older than even these years should warrant—alienated from his family—banished from his home—unable to live in harmony or even with decency with those upon whom Nature has given him the strongest of claims—incapable of maintaining himself by his own exertions—probably incompetent to even judiciously apply to his own support any means which might be placed at his disposal; these are the delicate and difficult conditions with which this Court is now to deal.

Upon the one hand, whatever may have been the misconduct of this man, to now deprive him of all interest in or support from this property, and to leave him either to suffer from want, or live an object of charity, public or private, would be revolting to every sense of justice or of decency. Upon the other hand, to set apart to him any portion of this land would be ineffectual for any purpose of assured support, as it is more than apparent that he is no longer capable of bestowing upon it either the labor or the attention which can render it remunerative. Thus bestowed, the share of the defendant would be speedily dissipated and he would soon be left wholly dependent upon his children or the public for support; and the property thus withdrawn from his family, and thus wasted, would, to that extent, impair the capacity of wife and children alike to further aid this unfortunate man.

The dictates of the most ordinary prudence demand that these, as assured consequences, should, if possible, be avoided. This can only be accomplished by setting apart to the wife the whole of the common property, and charging this estate in her hands with the reasonable support of the defendant. By so doing the defendant will not only have an assured income from the property he has helped to create, but will indirectly, but none the less justly, be aided by the earnings of the children he has reared, as it is but reasonable to suppose that they will assist their mother in sharing the burden by which an estate is preserved intact, which in the course of nature and of ordinary succession will eventually descend to them.

The right of the Court to create this charge, as also to consider the situation and duties of these children, if not in terms provided for in the statute, is certainly not overlooked in the Codes, and should not be disregarded by the Court. Says the Code: "The wife must support her husband, when he has not deserted her, out of her separate property, when he has no separate property and there is no community property, and he is unable from infirmity to support himself." (Sec. 176, Civil Code.)

It may be conceded that this section does not in terms provide for the case in hand, but the duty is certainly none the less when the Court endows her as her separate estate with the whole of the community property. So as to the children—"It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work to maintain such person to the extent of their ability." (Sec. 206, Civil Code.)

Thus chargeable with the maintenance of their father, should the defendant from any cause become impoverished, these children might well complain should the Court, by an improvident order now made, permit to be squandered any part of this property, which, properly managed, might suffice for his maintenance.

The remaining question is what amount shall be charged upon this property for the support of defendant and how it shall be applied.

As this matter is always open to revision by the Court, no mistake can be made not readily correctable. The defendant claims that he is able to work, and that he does, and has earned more than his livelihood. It may be assumed that he can by his own efforts earn at least a partial support. The amount upon this property set apart to plaintiff for which it will be charged for the support of the defendant will be hereafter determined. The times and manner in which it will be paid will be stated in the decree, and will be so adjusted as to be most convenient for plaintiff and most beneficial for the defendant. A counsel fee of $150 will be allowed counsel for the defendant, and will be charged upon this community property and provided for in the decree and final adjustment of the case. The decree to be submitted will provide that the same do stand open for such further and future orders as may to the Court seem equitable and just.

PETITION OF RICHARD ALEXANDER.

DECISION RENDERED JANUARY, 1886.

In answer to the writ of habeas corpus issued in this case, the Sheriff of Santa Clara County returns that he detains said petitioner in the County Jail of Santa Clara County under an order of Hon. James F. Breen, Superior Judge of San Benito County, determining that the County Jail of San Benito County is an unsafe place for the detention of said petitioner, and the Sheriff further returns an information filed in San Benito County charging said Alexander and seventeen others with the murder of one A. W. Powers.

For the petitioner it is claimed that the testimony taken in this case before the committing magistrate, and also before the coroner's jury, shows that the case is one in which the party is entitled to bail, this evidence not showing as against this petitioner a strong presumption of guilt.

The testimony as presented by the statement of counsel is substantially this: That many persons resident of the County of San Benito entertained feelings of great enmity toward Powers, the deceased; that several meetings were held by them for the purpose of considering the action they would take upon their assumed grievances; that at these meetings the policy of compelling deceased to leave the county, or, in the alternative of his not so doing, of "hanging him," was freely discussed; that the petitioner was present at all these meetings; that between the date of one meeting and of another which was agreed to be held for considering this question one Prewett, who had taken an active part in all these meetings, met the deceased and, without any act or present provocation upon the part of Powers, shot him dead; that, in a few hours after, Prewett informed this petitioner and these other parties of what he had done, and then with petitioner and a number of others repaired to the place of the killing, took the body of deceased and hanged it by the neck upon a tree, affixing to the body a label bearing the words, "One Hundred and Fifty Vigilantes." With this the evidence, to hold that a confederation for the purpose of unlawfully driving from the county a citizen, or, in the case that he shall not yield to their threats, of murdering him, is not a conspiracy, is, to my mind, a very impotent conclusion from very significant facts. That one of the parties so agreeing, immediately thereafter, and without other apparent cause than the purpose of carrying out the alternative of this avowed purpose, should shoot the object of their threats, would certainly seem to make an apparent connection between the precedent purpose and such subsequent act. That one of the parties who had participated in the prior arrangements should be found immediately after assisting the actual slayer in disposing of the body of his victim would not merely be admissible in evidence, but to me appears to be a fact of the gravest import and significance. The case, as presented to me, appears to be one of assassination by lying in wait—a crime certainly contemplated and discussed by the parties with whom this petitioner was consulting and confederating for this very purpose—and carried out by one of those associates, this defendant immediately thereafter, and when fully informed of what had taken place, assisting the slayer in making such disposition of the body as might mislead as to the real perpetrators. This is the position of this petitioner, and I am unable to reconcile either his precedent action or subsequent conduct with other than entire complicity with a most atrocious crime.

I find nothing in the character of the offense itself, or in the connection of the petitioner with it, which requires this Court in the exercise of a sound discretion to admit him to bail. Independent, however, of the petitioner's personal complicity in this matter, there are other considerations which are to be estimated. The principal purpose of admitting a defendant to bail, pending his trial for a crime, is to secure his attendance for trial, and this not in obtaining upon the part of the people a mere forfeiture of money if the party should not respond, but to place the defendant under such obligations of honor, imposed by his relations to his sureties, as shall outweigh the natural disposition to avoid, by flight, the possible consequences of grave and heinous crimes.

What are the inducements in this case which must, of necessity, press upon this defendant? He is himself charged with an offense involving his own life, and he has already, by his testimony, implicated seventeen persons of prominence and property in a transaction which involves the lives of all these parties. The inducements upon these parties thus endangered to prevent the farther or future appearance of this petitioner as a witness cannot be over-estimated. In the petitioner's position the effect of this pressure upon him must be well-nigh irresistible.

In a matter of this gravity, where the question is one for the exercise of a sound discretion upon the part of the Court, it is the duty of the Judge to estimate the probabilities that his order will secure the attendance of the defendant for the trial of the crime with which he is charged. In my opinion no amount of bail which a Court should in reason require would secure that result in the present case.

I have not considered the question of amount suggested by counsel upon this argument. Did I consider it a proper case for bail—one in which the purpose sought by such order would be accomplished—I should not grant the order and at the same time practically deny the right by fixing an extravagant amount, far beyond the reach of the citizen. Such orders are, I understand, the "excessive bail" against which Constitution as well as Courts have uniformly pronounced. I prefer in this case to base my ruling upon a proposition which certainly represents my best judgment, that under the circumstances of this case, and in the peculiar position of the petitioner, he ought not to be admitted to bail in any sum.

I have had in this case the assistance of Judge Breen of San Benito, who is entirely familiar with the testimony referred to, and have availed myself of that knowledge upon his part.

As Judge Breen has had occasion to pass upon similar applications, made upon the part of other of these defendants very differently circumstanced from this petitioner, I have not availed myself of his assistance as to the reasons indicated or the conclusions reached. In the views here expressed, Judge Breen's opinions are in no way indicated.

Ordered that the petitioner, Richard Alexander, be remanded to the custody of the Sheriff of Santa Clara County without bail.

SENTENCE OF JUNG QUONG SING.

DELIVERED JANUARY, 1886.

It is fitting in a case of this character, where an offence of this gravity, followed by consequences as serious as this, are involved, that all should understand that the judgment of the Court is based upon some satisfactory reasons, that the verdict of the jury is supported by the proof, and that when the law imposes its last dread penalty upon a human being there is not, in the name of justice and of law, another murder being perpetrated. It is therefore fitting that the officer who presides in this Court should indicate the reasons which, in his judgment, warranted the verdict and that now support the sentence which it is constrained to pronounce. There can be no question that Henry Vandervorst, by whoever he was slain, was the victim of a cowardly, cruel and wicked assassination. Upon the perpetrator of that crime should be visited the last penalty of the law, the judgment of death. In this case no witness has testified directly to the connection of this defendant with any act which led to this man's death; the evidence is that which is known to the law as circumstantial testimony; it is claimed by the prosecution that a series of facts independent in their character, and valuable only from their connection with each other and the coincidences which they present, showed this to be the actual criminal. I am aware that circumstantial evidence is regarded by many with disfavor and distrust; that juries often hesitate to pronounce the verdict which shall impose the last penalty known to the law in cases of this character; but law writers declare and the necessities of society compel the application of this class of evidence no matter what the consequences may be, for it is a fact that in cases of the greatest atrocity, where there has been the most deliberate premeditation and preparation, no other than circumstantial evidence can generally be procured. Where the crime is by poison, by lying in wait, from long preconceived motives of revenge, the assassin endeavors to so arrange his conduct, to so meet his victim, that no trace shall remain to connect him with the crime. As to the party slain, he proposes that death shall seal his lips, and so far as preparation can accomplish he proposes that his complicity shall be forever hidden. And so it is that, unless circumstantial evidence shall be received in Courts, and juries shall unhesitatingly act upon it, while applying every rule as to reasonable doubt and the presumption of innocence that attaches in all cases, it follows of necessity that the most atrocious crimes will go unpunished and the immunity of the defendant will be proportioned to the patient skill with which he has planned and executed his murderous purpose. The crimes to which eye-witnesses speak, as a rule, are those that follow some exhibition of passion--hot blood or some sudden resentment, far below in grade as to atrocity, heinousness, and the punishment which should follow those in which deliberate premeditation, robbery, or some malign revenge is the exciting cause; so it is that circumstantial evidence must be admitted or the worst of crimes go unpunished.

What are the circumstances in this case? They were submitted to the jury with every direction which the Court could suggest, indicating the caution with which it should be considered, the gravity of the consequences which would follow from it, and the necessity for the most thorough and careful and scrupulous examination of the facts by which it was sustained. The circumstances of the case here are perhaps not of the strongest or most convincing character. Are they sufficient to sustain the verdict? I propose briefly examining them. The evidence shows that Vandervorst had within a short time preceding his death opened a saloon upon a not much frequented road of the county. He purposed engaging in that business, and had furnished himself with a small stock of the commodities used in that vocation. Upon the night of the 7th of October he was alive, and was found the next morning dead with a number of wounds upon his head, apparently inflicted with a hatchet, and those are all the traces of the murderer that were revealed by the immediate surroundings of the homicide. That he was killed for gain seems incredible; the nature of the business, the short time in which he had been engaged in it, the fact that he had been employed as a laborer shortly before, seem to indicate that robbery was not the principal cause, and I am to look elsewhere for a motive which may have impelled to this fell deed. It appears from the testimony that the defendant in this case and the deceased had worked in the same family; that their relations had been most unpleasant, constant bickering going on between them, and in which the interposition of Mr. Townsend, the proprietor, had been required to prevent actual violence; that while this condition of affairs existed, Vandervorst removed from the house, and, as I have stated, established himself in this saloon. While he was in this saloon the defendant continued in the employ of Mr. Townsend at a place not remote from Vandervorst's saloon. Previous to the killing, a hatchet, a weapon with which these wounds could well have been inflicted, was part of the utensils of the kitchen in which this defendant acted as cook. There is nothing to show that that hatchet was not at the time in a reasonably effective condition, its handle in place and secured by nails. Upon the morning following the homicide this hatchet was wanting, was not in its usual place. Attention was attracted to the fact by the knowledge that Vandervorst had been killed by blows of a hatchet, and upon investigation it was found that the former handle had been removed and a very inefficient one substituted in its place by defendant. No portion of the original handle is produced, no traces of the nails or other means by which it was secured to the blade found, no reasons given why this handle should have been removed at all or the condition of this hatchet changed. Had the hatchet when found been in its usual place, had it been covered with blood, the significance of that fact would have been very greatly abated. There are many reasons why a hatchet of that character thus used about a kitchen might become stained, and many natural and probable explanations could be given for it. The significance of this fact lies entirely in the conduct of the defendant, indicating that he had some purpose, something to conceal, in changing the handle of this implement. Had he left it there, no matter what its condition, in my judgment it would scarcely weigh as a circumstance in the case; but that he is found changing the handle, grinding the blade of the hatchet, and doing this on the morning succeeding the killing, shows a consciousness upon his part that there was something in that implement which called for concealment upon his part, and which required a change for his security. It is therefore not the condition of the hatchet at that time, but defendant's conduct, which gives the significance to this circumstance in the case.

Upon searching defendant's room two other articles were found, one a pistol, the other a knife. The evidence is as satisfactory as evidence identifying such articles ever is that these were purchased by Vandervorst, and kept by him at the saloon, the pistol identified with all the accuracy that such an article ever could be; these were found in the room, in the possession of the defendant. If they were Vandervorst's, if the pistol and knife were indeed in his possession on the night of the homicide, the fact that they were found the next day in the possession of this defendant, at a place to which he alone had access, is a circumstance of the utmost significance. The probability that they were the fruits of this crime, and that the man that thus possessed them found them in the possession of this dead man and took them from him, is, of course, all that gives it its weight; if they were the fruits of another act or acquired in any other way, of course that as a circumstance falls out of the case. The fact that he had made no attempt to conceal them, left them out in sight, where any person could have observed them, diminishes the force of the circumstance, yet still it leaves it as a circumstance dependent of course for its weight upon the proof that they were Vandervorst's articles, and that they must have been taken by defendant from his saloon on the night of the murder. These are two of the circumstances.

To the fact of the bloodstains on the pair of shoes, or the trace of blood upon the hatchet, I attach very much less importance. Such stains may be acquired in many ways independent of any criminal act, but the conduct of the defendant as to blacking his shoes as though in order to conceal the stains, or an act that would conceal the stains, and changing the handle of the hatchet without any apparent cause, and the possession of these articles, make a series of circumstances all coincident, pointing to one conclusion—to the defendant as the most probable party to this crime. I have already spoken of the significance of this hatchet. I may add another view which may be taken of it: While this is an instrument deadly and certain, it is not one usually employed by men who commit crimes for the purposes of gain; it is an instrument usually resorted to upon an exigency, usually taken because it is convenient, because it could be effectively employed and readily concealed. I apprehend public officers have rarely arrested robbers or desperadoes in this State or elsewhere that have been armed with a weapon of this character. It is a weapon that is usually employed in the vicinity of the place where it was obtained, and it is not a part of the equipment of the professional miscreant or thief. In that fact I find a circumstance that suggests the employment of the weapon in the hands of the defendant in a crime which he purposed committing in the immediate vicinity of the place where he was employed. These circumstances, each estimated by itself, are perhaps of little force. Weighed together, their effect and their conclusiveness can hardly be over-estimated. They are like the footprints of men upon the yielding soil; each footprint taken by itself but indicates that a human being has passed by, but when traced from the body of a murdered man to one fleeing from the vicinity, they have a significance suggestive as it is conclusive, and while each taken by itself is a trifle light as air, yet brought together in their regular sequence they bring the murderer and his victim face to face, and him to certain justice. So it is that the circumstances in this case, each taken by itself and estimated by itself, may appear of but little moment, but considered together, they present these parties at variance, a motive upon the part of the defendant to injure the deceased from feelings of revenge, an implement to his hand by which these wounds could have been inflicted, an effort made to conceal the condition and to change the appearance of this weapon, articles notoriously in the possession of the deceased found immediately after in the possession of the defendant. I think this makes the measure of proof which in testimony of this character must satisfy the requirements of justice.

I have considered this testimony with care during the period that has intervened since the verdict, for the purpose of satisfying my own mind that there was that measure of proof which would justify the extreme penalty required by this verdict. Unless circumstantial evidence of this weight is to be wholly disregarded, unless the conclusions of jurors and the verdicts of juries passing upon such facts are to be cast wholly aside, it must have in this case its full effect, and judgment must be pronounced upon it. I have made this statement reviewing briefly the different matters as they were presented by the testimony. In my opinion they justify the verdict of the jury, and all that remains for the Court is to pronounce the penalty which the law commands.

The judgment which the law imposes is death; that you, Jung Quong Sing, be kept by the Sheriff of Santa Clara County in some secure place, that by said Sheriff at the place prescribed by law, and in the manner which the law commands, and at the time which the Court in its warrant shall hereafter indicate, you be hung by the neck until you be dead, and may God in His goodness have mercy on your soul.

Friday, March 26, 1886, will be the day indicated in the warrant for the execution of this penalty. Mr. Clerk, enter the judgment. Mr. Sheriff, remand the prisoner.

DE LA ROSA vs. BARIC.

DECISION RENDERED JANUARY, 188[illegible].

Upon the facts found in this case the only question presented is this: Can a party who, at his request, loans another money, knowing that the borrower proposes to bet the same upon a game prohibited by law, recover in an action at law the money so loaned?

The assiduity of counsel has produced no decision directly in point; I shall therefore briefly indicate what I understand has been determined in this State upon this question.

From a very early day the decisions in this State took very strong ground against the right to recover upon gambling debts.—Bryant vs. Mead, 1 Cal., 441; Curpen vs. Brannan, 3 Cal., 328; Gahan vs. Neville, 2 Cal., 81.

Nor do the later decisions indicate any relaxation of this most salutary rule.—Hill vs. Kid, 43 Cal., 615; Gridley vs. Dorn, 57 Cal., 79.

By these and other decisions based upon them it is determined:

That for money won or lost at gambling no action will lie.

That for money bet upon any uncertain event, as an election, a horse race or the like, no action can be maintained.

That until the event upon which the money is wagered is determined by the happening of the event either party may demand and recover from the stake-holder his own stake; but that after the happening of the event neither party can recover the money wagered.

These principles are maintained by the Court upon a variety of reasons—sometimes that such contracts are against public policy; sometimes that they are *nudum pactum* and void for want of consideration, the mere chance which either party hazards in an uncertain event being held insufficient to support any legal obligation. In all the cases, however, it appears that the illegality or defect in the consideration entered into, and formed a part of, the asserted contract. In the present case it will be observed that if there be any illegality it is not by the terms, either express or implied, of any contract which accompanied this loan. In fact the entire contract in its strictest sense is one employed by law. The defendant requests a loan, which is made without qualification or restriction. From such a transaction the law implies the correlative obligation—the promise to repay. *Eo instante*, upon the reception of this money by defendant, the plaintiff's right of action was complete, and before defendant could have made a movement toward the disposition of this money the law had fixed his legal liability. By what system of reasoning can an obligation thus complete, and thus concluded, become thereafter infected or vitiated by any course which the borrower may see fit to pursue, and to which the lender is in no way a party? In my opinion, to bring the transaction within the line of prohibition, there must be, between the borrower and the lender, and in the actual lending, some agreement, assurance, or representation that the money, if loaned, will be employed in the illegal manner, and this made in such a manner that the Court can see that such assurance may have been in part, at least, the moving cause for the loan. When such a fact is presented it may be said to enter into the contract and to wholly vitiate it. The case at bar is very far from the one suggested, and in my opinion beyond any rule to be found either within the precedents cited, or the principles upon which they are supported.

Defendant cites with confidence Peck vs. ———, 3d Denio, 340. In that case the plaintiff was making up a purse to bet upon a horse race. The defendant agreed to furnish a portion of the money required, and requested plaintiff to advance the money for him, which he did. The race was lost and plaintiff sued defendant for the money so advanced. It was held that plaintiff could not recover. This case is clearly within the rule I have above indicated. The original agreement under which the money was advanced was infected by the actual assurance that plaintiff would employ it for an illegal purpose. To make the cases at all parallel, De la Rosa should have requested Baric to bet for him at the game, and have promised to reimburse him for the money he might lose—a very different proposition from the one here presented.

The case of Poorman vs. Mills & Co., 39 Cal., 345, is in accord with these views. In that case one Rosebaum was the payee of a certificate of deposit signed by S. E. Mills & Co. for $1,500. Says the opinion of the Court: "This he indorsed and delivered to E. M. Skaggs at the rooms occupied by Skaggs for gambling purposes; that Skaggs' business was gambling; that Skaggs paid for this certificate $100 in money and $1,400 in ivory checks; that previous to the transfer of this check the payee had been playing at the game." The lower Court held that plaintiff could not recover upon this assigned certificate. The Supreme Court reversed this judgment and said: "The evidence entirely fails to establish that the consideration for such indorsement and transfer was money, or anything of value lost by the payee or *won* by the indorsee or any other person at any of the prohibited games." * * * *

While other propositions were involved in this case, the above extract recognizes the rule I have indicated—that the illegality of the transaction must be found in the consideration which moved between the parties. No other rule appears to me to be practicable. There are in every community individuals of whom it may be assumed that any loan made to them will be employed in gambling, drunkenness or other debauchery. The probabilities of such a result, and the knowledge of the party, must vary with the character and acquaintance of the particular individuals, ranging from the merest suspicion to assured conviction. Can this inquiry be set on foot in every loan made to such a party, or in fact by any party? All this is certainly within the rule contended for by defendant. However salutary such a rule of moral censorship might be, as men now are, and the law now is, it is in my judgment wholly impracticable. It may be thought that the distinction taken in this case is a narrow and therefore a questionable one. I have endeavored to show that such a distinction does exist and must be somewhere drawn. In every branch of law, criminal as well as civil, a point is reached at which accountability begins as well as ends. That place is of necessity a line. It is at this line that the decisions differ and the Courts doubt, but whether this line be sharply defined or be shadowy, it is as essential to the definition of legal principles as of geometrical problems, and must be located by the Court in judging of the cases which approach it.

In my opinion the case at bar falls upon the side of legal accountability and it is so adjudged. Judgment for plaintiff for $150 and costs.

BROWN vs. CITY OF SAN JOSE:

DECISION RENDERED JANUARY, 1886.

This action is brought by plaintiff to recover from defendant the sum of $375, alleged to be due as salary of plaintiff as Chief of Police for the months of June, July and August, 1885.

The defendant, in its answer, admits most of plaintiff's averments, but seeks to avoid their effect and its own liability by alleging that upon the 23rd day of May, 1885, there was laid before the Mayor of San Jose a complaint in writing charging the plaintiff, as Chief of Police, with certain derelictions in office; that thereupon, upon the 25th of May, 1885, the Mayor of the city made an order directing that said charges be submitted to and investigated by the City Council, and that pending said investigation said plaintiff "be suspended from the functions of said office as Chief of Police"; that thereafter, and in due form, said Mayor and Common Council proceeded to and did investigate said charges; that as the result of said investigation it was upon the 27th of August, 1885, by said Common Council determined and adjudged that said Brown was guilty of certain charges specified against him; that this finding was by the Mayor then and there regularly approved; that upon said finding and approval it was by the Mayor and Common Council adjudged that said plaintiff be suspended from his office for three months without pay, to wit, from the 1st of June, 1885, to the 1st of September, 1885, and that he be reprimanded by the Mayor. It is further alleged that during this period of three months the plaintiff performed no duties as Chief of Police.

This is in substance the defense presented by the answer, and to it plaintiff interposes a general demurrer that it does not constitute any defense to plaintiff's action.

It is a proposition which requires neither argument nor precedents for its maintenance that any judgment or exercise of authority by which the citizen is deprived of either life, liberty, or property must have as the foundation for its exercise some positive, precedent declaration in the written law—that unless the law which prohibits an act provides also a penalty, the Courts are powerless to provide one; and that when the law does declare a penalty or adjudge a consequence, that, as declared by the law, is the measure as well as mode in which its penalties must be enforced.

In cases like the present the Charter of the city is the measure of the power of all the officers created by it. Its declarations, prohibitions and penalties are the measure as well as the mode of all authority which may be exercised under it.

In the present case plaintiff is an officer provided for in the Charter itself; elected directly by the people, his powers and his duties are of equal dignity with those of the Mayor and Common Council, whose powers are derived from the same source. When and where he is amenable to their action, or subject to their control, is to be determined by an examination of the Charter, the common source of both their and his authority. Interrogating this Charter, we find this power conferred upon the Mayor and Common Council as to action they may take concerning the Chief of Police: "The Common Council shall have power to remove, for good and sufficient cause, and after notice to the party accused, by a three-fourths' vote, with the Mayor's approval, any and all city officers, whether elected or appointed (members of the Board of Education excepted), and to fill any vacancy so caused." (Sec. 9, City Charter.)

This by the express terms of the Charter is the penalty the Mayor and Common Council may impose, and none other is provided.

If I am correct in my general statement that no tribunal can impose other penalties than those in express terms provided, the Mayor and Council had no more authority to suspend this official for three months than for his entire term—without pay than with pay—had the same power to amerce him in fines which should deprive him of all his former or future salary as to deprive him of this salary for three months or for any other time.

Remove him they certainly could, for this right is directly given. Suspend him they could not—fine him they could not—for the reason that the Charter no more conferred that power than it did the right to imprison in the discretion of this body. The rule thus announced is not a peculiar one specially applicable to municipal bodies. It is a rule of universal and uniform application, and governs the action of all tribunals charged with similar duties. The Superior Courts of this State have no authority or right to punish misdemeanors by imprisonment in the State Prison, or felons by incarceration in the County Jail, murderers by the imposition of fines, or thieves by flogging. Within the statute which creates the offense and prescribes the penalty all its powers are to be found, and within this prescribed sphere are to be exercised.

It is argued upon the part of the defendant that suspension is but a temporary removal, and that as the power to remove is given, this may be taken as included within the larger rule.

It may be as counsel insists, and that the converse is equally true—that removal is but a permanent suspension. This, however, is not the sense in which these terms are here employed, nor in which they are to be construed. Both, as will be presently shown, are employed in this connection and in a very dissimilar sense, and for widely variant purposes.

It has already been stated that the Mayor, at the commencement of these proceedings, made an order suspending this plaintiff from "the functions of his office," and it will be observed that the period embraced in this penalty was within two or three days of the period in which plaintiff was suspended by the order of the Mayor. If, therefore, the Mayor and Common Council have no right to suspend after a trial, and as a mode of punishment, it becomes necessary to inquire as to the effect of the Mayor's order of suspension. This power is conferred by the Charter in the following terms: "He shall receive and examine into all such complaints as may be preferred against all subordinate officers for violation or neglect of duty and certify the same to the Common Council, and may suspend the function of such subordinate officer until the charges preferred against him can be inquired into by the Common Council." (Sec. 35, City Charter.)

Of the power to suspend, as above conferred, there can be no question, nor can there be any that when exercised it inhibits the party from performing the ordinary or any of the duties pertaining to his office. Does it also, and *ex proprio vigore*, absolutely deprive the official of his salary during the period of such suspension? In my opinion it does not.

Very satisfactory reasons may be suggested why, pending the investigation of a serious charge, the implicated official should be prevented from acting in the general line of his duties. The charge might involve in the gravest manner his character as well as his general efficiency, and serious detriment to the public service might result were he to be permitted to continue in those duties. Independent of that, it would present a very unseemly spectacle for an officer whose own conduct is called in question and who is undergoing investigation to act as a general conservator of the conduct and morals of others. These considerations would not apply to the mere reception of his salary, usually for a brief period, and while the requisite investigation was being made.

Farther than this, the result of such inquiry might be the absolute acquittal of the party. In such a case the injustice of depriving him of his salary while assailed with groundless charges need but be suggested. It may be added that even while such charges are being investigated the party is still a city official—it is only as such that he can be proceeded against at all. At any moment the Mayor may withdraw his order of suspension, or the Council may acquit, and he may and must at once resume all his duties. He certainly ought not, while in this position, virtually incapacitated for entering upon any other business, be deprived of his salary necessary to his maintenance, unless there be rule as well as reason for so determining.

This is my view of the effect of this suspensory action of the Mayor. Nor am I alone in this construction. The honorable the Mayor and the Council, in awarding as a penalty the non-payment of plaintiff's salary during the very period included within the Mayor's order of suspension, recognized the fact that the salary for those three months had not been affected by the order of suspension, as they certainly did not propose to take from him as a punishment that of which he had already been deprived by another proceeding.

And, again, as to the equitable view taken of this procedure. The same honorable body formulated in an ordinance for the government of the police force the same proposition, as follows: "The Chief of Police for certain causes shall have the power to suspend such police officer from duty. If he be reinstated he shall be entitled to his pay the same as if he had not been suspended." (Secs. 11, 12, 13 and 14, Ordinance to Provide for a Police Force, etc.)

These actions upon the part of the Mayor and Common Council are of course not binding authority upon the Court. They are, however, entitled to respectful consideration as the deliberate opinions of officials construing the instrument under which they are acting and which the Court is interpreting.

It was further argued that as the plaintiff performed no services during this period, he is for that reason entitled to no compensation. It may be stated that as a rule salaried officials do not have their compensation measured by their services; further, that, as already shown, the Mayor had the undoubted authority to suspend him pending this investigation, and that this action of the Mayor absolutely arrested and inhibited any attempt at official action upon his part. Further, were this not the case, and had the Mayor not possessed the power which he asserted and exercised, it would still have been the duty of the plaintiff to have yielded obedience pending this investigation, or until the action of the Courts could have been invoked. Any attempted exercise of his functions against the order of the Chief Executive of the city, or against the officer temporarily substituted in his place, would have but resulted in fruitless collisions, most detrimental to the public peace and the good order of the city.

That the plaintiff in this case yielded respectfully to the order of his apparent superior, pursued that course which decorum and decency would prescribe for the conduct of a law-abiding citizen—will not be imputed to him as a failure of duty or a waiver of right.

The matters here considered are presented by demurrer to defendant's answer, and a mere ruling upon this demurrer would perhaps be all that is required at this stage; but as the plaintiff's claim, as affected by the order of the Mayor and the action of the Common Council, has been fully discussed by counsel, I have thought proper to examine the question upon its merits.

The demurrer of the plaintiff to defendant's answer is sustained.

CHAPTER XVIII.

PUBLIC WATER SUPPLY.

OPINION IN THE CASE OF THE LOS GATOS MANUFACTURING COMPANY vs. THE SAN JOSE WATER COMPANY.

DELIVERED JANUARY, 1886.

PLAINTIFF brings this action and alleges that it is the owner of a tract of land of about five acres upon the bank and including a portion of the bed of the Los Gatos Creek. It further avers that being so the owners of this tract, in its complaint specifically described, the defendant gives out and asserts that it has some right or interest in this tract; that by this giving out and assertion the title of the plaintiff is clouded and disturbed; that the assertions of defendant as to such interests are false and unfounded. Wherefore it prays that defendant be required to appear and set forth the nature of its claim and the Court to thereupon adjudge its nullity and the usual relief sought in such cases.

The defendant answers and avers that it is the owner of a portion of the tract described in plaintiff's complaint, to wit, about two acres; and further, that plaintiff and defendant are, and for over ten years have been, owners of a dam erected in the bed of the creek upon the tract of land described in plaintiff's complaint; that by this dam the waters of said creek are diverted from the channel of the creek and conducted into a ditch or flume which passes over said five-acre tract; that said ditch or flume continues through and beyond this tract of land to a mill owned by plaintiff upon the bed of said Los Gatos Creek; that it is there by plaintiff used as a motive power for said mill; that after the full use and employment of said water as a motor by plaintiff, it flows from the tail-race of said mill into the channel of said creek; that it is there taken up by defendant, conducted into their ditches and flumes, and at great cost and expense conveyed to the Town of Santa Clara and the City of San Jose, where it is beneficially used and employed by the citizens as the water supply of said communities.

The defendant further asserts the right of license by prescription, by purchase, and by user, to conduct and convey the waters of the stream for this purpose over and through this tract of five acres.

The defendant further and in like manner, and by the like right, and through the same means, and for the same purpose, asserts the right in itself to take or divert the waters of said stream from the point below the tail-race of plaintiff's mill. It further asserts that plaintiff denies said right, and gives out and threatens to prevent said defendant from so diverting said waters at the end of its tail-race; that thereby the right of the defendant is threatened, clouded and endangered, and its property and value depreciated. Wherefore it prays that all these matters may in this action be adjudicated and determined, the plaintiff enjoined and restrained, etc., and for general relief.

To so much of this answer as seeks to draw into this controversy the right asserted by defendant to divert these waters at the tail-race of plaintiff's mill, plaintiff both demurs and moves to strike out the same upon the ground that they are no defence to the original action of plaintiff, and are multifarious and improper.

Without considering by line and paragraph the portions of the answer to which these motions are addressed, I shall consider them all as called in question, as being multifarious, and shall first consider the matters in the answer which in my opinion do not admit of successful controversy.

The defendant's assertion that it owns two acres of the five is of course not questioned. That it must set forth any other estate it may possess in this tract, whether it be a fee or an interest, a right in the soil itself or a right over it by contract, prescription, or user, must be conceded. If defendant does possess any such interest or estate it must assert it here, and make good that assertion, or it will find itself forever silenced as to any such asserted right. It must assert and show a beneficial use in itself to the water which it seeks to conduct over this tract; a mere barren and useless right, connected with no beneficial use, certainly would meet with little favor, even if it would obtain a recognition, at the hands of the Court. (Weaver vs. Eureka Lake Co., 15 Cal., 271.)

It was therefore obligatory upon the defendant to show that the right which he asserted to maintain this flume and flow these waters over this land was in the exercise of a substantial right and as a means to a beneficial use; the answer therefore very properly showed the use—the supplying of San Jose and other communities with water. All this was, in my opinion, indispensable to the maintenance of this, even as an easement upon the five-acre tract. Can the defendant, thus called into this controversy, assert and have determined, as against this plaintiff, the other means and appliances by which this same right is upon its part asserted and exercised, and which are in like manner by plaintiff called in question? And does the assertion as here made of these rights render this answer obnoxious to this objection of multifariousness? The leading case in this State upon that subject is Wilson vs. Castro, 31 Cal., 430. In this case an objection that a bill was multifarious in that improper parties were united as defendants, and further, that several causes of action were improperly united, was sustained by the lower Court, but upon appeal and upon the most elaborate examination of the authorities this judgment was reversed by the Supreme Court upon both these points.

In the present case the misjoinder of parties is not presented. Is it obnoxious to the objection of multifariousness as to causes of action? In Wilson vs. Castro, above cited, says the Court, citing from Story's Equity Pleading:

"To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must concur: First, the different grounds of suit must be wholly distinct. Secondly, each ground must be sufficient as stated to sustain a bill, if the grounds be not entirely distinct and unconnected, if they arise out of one and the same transaction or series of transactions, forming one course of dealing and all tending to one. If one connected story can be told of the whole, the objection does not apply." And adds: "The opposite of this view, if established in equity, would be very mischievous and oppressive in practice, and no possible advantage could be gained by it. It would lead to a multiplication of suits in cases where it would answer no assignable purpose but to have the subject matter split into a variety of separate bills," and "where the interests of the plaintiffs are the same, although the defendants may not have a co-extensive common interest, but their interest may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the Court will not hesitate to sustain the bill against all of them."

The foregoing is a mere excerpt from an elaborate and exhaustive opinion in which the leading cases, as well as approved text-books upon this subject, are fully reviewed; and the doctrines there laid down have never, so far as I am aware, been called in question in this State. In my opinion the matters set forth in the defendant's cross-complaint are clearly within the rule above enunciated.

The right which the defendant is seeking to maintain is to divert and conduct the waters of the Los Gatos Creek to San Jose. This right the plaintiff is disturbing as to the five-acre tract, and denying as to the site of the tail-race. It is, as to defendant, an assertion of the same right as to both these points, and for one purpose. It is, as to the same plaintiff, a denial of this one right at these two places. If at a point a few rods below the five-acre tract, and separated from it by lands of defendant, or of a third party, a similar assertion was made by plaintiff, a similar controversy presented, could it be denied that, under the authority above cited, this defendant could and should dispose of both these assertions in one suit? Or were the present defendant plaintiff, seeking as against this plaintiff to quiet its right to maintain its ditch, and flow its waters over a number of distinct parcels of land to San Jose, can it be questioned that in one bill it could assert the groundless claim of this party to all these parcels, and by one decree have it determined as to all of them?

What do the cases mean by "avoiding useless and multiplied litigation" unless they refer to just such a transaction?

Suppose that in this case the defendant shall succeed upon the cross-complaint, and shall obtain a decree quieting its right to have its ditch maintained, and its waters flow over this five-acre tract, and that it shall then file a similar bill and establish the same right as to the same waters at the tail of this plaintiff's race. In what appreciable way will these bills differ from each other except as to the mere adventitious fact of place? What reason can be suggested why this asserted claim, as against this one party, to this single right, should not be quieted at both these, or at a score of other places?

To deny this right is to invite and encourage the hardship and inconvenience which all the authorities deprecate—is to compel a party to prosecute in a multitude of cases, established through the same witnesses by the same proofs and against the same party, the one single controversy.

The assertion of counsel upon the argument, "that in this as in other controversies the plaintiff could select his own field of battle and compel his adversary to meet him there," is but partially true of either the contests of the field or the forum. In either, the position as well as attitude of the parties may be transposed by the fortunes of the war. The plaintiff who assails in the full confidence of an invincible legal title, may find himself called upon to defend against a superior and far-reaching equity wielded by his adversary, and can neither restrict the field nor prescribe the weapons with which his own assault is to be met and repelled.

In my opinion the matters set forth in defendant's cross-complaint and summarized in this opinion are not multifarious, and the motion to strike out the same is denied. Upon the argument of this motion defendant's counsel confessed error as to a point which may involve the remodeling of the answer. With these views as to what may be retained, the demurrer is sustained, with ten days to defendant to amend.

SUBSIDY TO RAILROADS.

DECISION RENDERED FEBRUARY, 1886.

When the Court adjourned at noon the plaintiff submitted his case upon his bill, and the answer of the defendant, and upon these alone. The defendant moves for a non-suit upon the ground that the material averments of the complainant's bill are fully denied, and that as no evidence was offered upon the part of the plaintiff in their support, he cannot recover upon the case thus presented. In opposition to this motion plaintiff urges and argues but two propositions:

First.—That the submission by the Board of Supervisors to the people of the county of two railroad propositions was in excess of the powers given them by the so-called Five Per Cent. Act; that when one such proposition is submitted the power of the Board to act further and submit other subsidy questions is exhausted.

Second.—That the Legislature, by Act of January, 1874, repealed absolutely the so-called Five Per Cent. Subsidy Act, and that with this repeal was repealed and abolished all rights, inchoate or complete, that had before existed or were created by virtue of the original Subsidy Act.

These are the only two propositions that are urged by the plaintiff. I regret that the limited time afforded me to examine this question has been so disproportionate to its importance and magnitude; but as the question must probably be determined by the Supreme Court, I suppose that the interest and convenience of all concerned will be better subserved by an immediate decision than by further delay. Upon the first point urged by counsel, the exhaustion of the powers of the Supervisors by the submission of one question, I do not agree with the plaintiff. In my opinion, the limitation as to supervisional power is determined by the proportion which the tax bears to the assessable property of the county, and is judged by this alone; that the number of such enterprises that may be considered, or their diversity as to location, is immaterial, so that the aggregate is found to be within the five per cent. limit prescribed by the Legislature. Upon the second point, that the Legislature, by repealing the original Subsidy Act, has repealed all rights that had arisen under it, I do not consent to this proposition. I understand that it is in the power of the Legislature, by repeal, to abrogate all forms of legislation which have not in some measure ripened into a contract relation; but that when, from the legislation sought to be repealed, it appears that contract rights have arisen, inchoate or complete, then such rights are placed within the protection alike of the Constitution of the United States and of this State, and become vested rights as to those claiming this benefit, which are beyond the power and purview of legislative interference; and while, in many cases decided, very nice and subtle distinctions are drawn as to when a Legislature may or may not thus interfere, yet I understand that when any element of contract is involved which the Court can see might be disturbed by the legislative interference, it places the inhibition of the Constitution upon the legislative act thus attempted in derogation of individual rights. It is claimed by counsel that the Five Per Cent. Subsidy Act, however, is a mere gratuity having no considerations for its support, and may be withdrawn at the will of the Legislature, as a pension or annuity might be repealed. I do not so understand the Act, nor can I see how that could be maintained, or any subsidy upheld upon the theory that it was a mere gift or gratuity that was bestowed. The many decisions, State and National, which have upheld subsidies by political bodies to corporations of this character, have proceeded upon the theory that reciprocal benefits, advantages and obligations exist between the public affording the aid and the corporation receiving the benefit; that increased facilities for transportation and intercommunication upon the one hand, were a sufficient consideration for the subsidy bestowed upon the other. It is upon this theory and this alone that any plausible excuse can be found for turning the public revenue derived from taxation into private enterprises of any character, and the proposition that these subsidies, so styled, are mere gratuities, pure donations, finds no support, either in the cases which maintain them or the reasoning by which they are upheld. In my judgment the granting of a subsidy and its employment create reciprocal obligations which rise to the dignity of a contract, and which may be enforced in a proper proceeding by proper authority. It is argued further by counsel for the plaintiff, that while this might be true as to an executed contract, yet that the contract now in hand is an executory one, and therefore revocable at the will of the Legislature. I do not deem it necessary to consider this argument to the extent to which it is urged. It is sufficient to say that so far as the $30,000 subscription here asked for is concerned, the contract to the extent of the five miles provided for is executed and complete, and the argument therefore of counsel, that the general contract has not yet been completed, has no application to the present case, in which a completed feature of the contract is sought to be enforced. It is further claimed by counsel that the contract set forth in plaintiff's complaint between the Board of Supervisors and the railroad company is wholly inoperative, for the reason that the Board of Supervisors have no authority to enter into such contract; that the subsidy voted by some form passes directly to the beneficiary, and that the county has no power to secure by proper contract obligations the application of its aid. I do not agree with counsel as to this position. It would be a singular position if, after the vote of the people had determined that aid should be given to a railroad company for a specific object, the financial representatives of the people, "the Board of Supervisors," could take no precautions to see that the money thus voted was applied in the manner contemplated by the will of the people. If the argument of counsel be correct, it would be the duty of the financial officers of the county upon the vote being declared to immediately turn over to the railroad company the subsidy agreed to, leaving it entirely to the good faith and honesty of the recipients to carry out the purpose had in view. I have no doubt that it is the right, as it is the duty, of the Supervisors, in every matter in which the county interests are involved or the county moneys to be disbursed, to secure the proper performance of obligations in which the county is interested by contracts and bonds, and whatever else may be required to secure the purpose contemplated; and I have no doubt that in the present case the contract of the Board of Supervisors made with this railroad company was in strict conformity to their duty, and that this action, and the laws under which the Board were acting, did create in its fullest sense a contract with which neither Legislature nor county can interfere. I am satisfied that upon this case made by these pleadings, and now presented on this motion for a non-suit, the defendant is entitled to the judgment asked. Ordered that plaintiff be non-suited.

Mr. Patterson noted an exception to the decision, and asked that the Court fix the bond continuing the injunction pending the appeal. Mr. Younger insisted that the granting of the non-suit dissolved the injunction, and that it could not be reinstated by the Court. Judge Belden called the attention of counsel to certain provisions of the amended Code, and said that he would hear the counsel upon the motion on the following morning. The Judge further said that if the power could be found in the Code to retain the injunction pending the appeal, upon giving a suitable bond, he should be strongly disposed to exercise it.

WM. H. PATTERSON vs. BOARD OF SUPERVISORS OF SANTA CRUZ COUNTY.

And now again come the parties, by their attorneys and plaintiffs, having on yesterday moved the Court for a stay of execution for costs herein and for a continuance of the preliminary injunction, heretofore granted herein for ten days, to enable him to perfect and appeal to the Supreme Court of California from the judgment of this Court herein; and the hearing of such motion having been continued until to-day, and this being the time fixed for hearing argument on such motion, the same is now argued by Wm. H. Patterson, for plaintiff, and by C. B. Younger for defendant, and is submitted to the Court for decision; and the Court having considered such motion and the argument of the said attorneys, now here, in open Court, renders its decision herein, and denies such motion for a continuance of said preliminary injunction and grants such motion as to a stay of execution. It is therefore ordered that the preliminary injunction heretofore granted and issued herein be and is hereby dissolved. It is further ordered that execution for costs herein be and hereby is stayed for ten days.

HURLEY vs. HURLEY.

DECISION RENDERED FEBRUARY, 1886.

The plaintiff in this case sues for a separate maintenance upon the ground of willful desertion on the part of the defendant. To maintain this action she relies upon two sections of the Civil Code—Section 137, which reads: "When the husband willfully deserts the wife she may, without applying for a divorce, maintain in the Superior Court an action for the permanent maintenance of herself, or of herself and her children;" and Section 98: "Departure or absence of one party from the family dwelling-place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party but is desertion by the other party."

Under these sections plaintiff complains that she was compelled to leave by the cruel conduct of the defendant.

The acts complained of may be easily stated:

In a photographic album of the parties, and upon the first page, the plaintiff placed the picture of a gentleman whom defendant regarded as a personal enemy and very much disliked. Defendant had frequently remonstrated with plaintiff for keeping this picture in this book; had requested her to remove it, and had threatened that unless she did he would destroy it. The plaintiff paid no attention to these remonstrances, and, in a sudden fit of wrath, defendant stamped upon the album and crushed alike the offending and all the other pictures contained in it. The next morning he purchased a new album of the same character and offered it to plaintiff. There is no reason for commending defendant's method of disposing of an objectionable photograph, nor is plaintiff's retention of it in this receptacle, usually devoted to pictures and mementoes of relatives and esteemed friends, against defendant's repeated remonstrances, to be approved. Without further comment I shall pass this conduct of these spouses as to the album. The act of defendant in "pushing plaintiff against the side of the door" is not without extenuating circumstances. The plaintiff and defendant were engaged in a wordy altercation. The sister of plaintiff, not residing in the family, was present and made some sarcastic remarks as to the conduct of defendant. Defendant ordered her to leave the house, which she refused to do, and in this refusal she was supported by plaintiff. The defendant attempted to push the sister from the room; both the sisters resisted this attempt, and plaintiff was pushed violently against the door. Of this proceeding it may be said that the husband is the head of the household and the master of the house. He is accountable for its management and responsible for what transpires within it. He can say who shall and who shall not be received there, and can command anyone to whom he may object to remove from his house, and if upon such request they refuse, he may use such necessary and reasonable force as may secure their expulsion. Sisters-in-law are no exception to this rule, and when the defendant ordered this party to leave the house and she refused, he had the right to remove her, and when his wife interfered and endeavoured by force to prevent this she was clearly in the wrong, and if, in such a contest, she was treated with rudeness, or resisted with force, it was an exhibition of violence which her own conduct invited, and will not be interpreted as cruelty on the part of the defendant.

As to the throwing of the dressing-case, the defendant admits the throwing, but says he did not throw it at the plaintiff and that it did not hit her. She asserts that she was intentionally hit by it. It seems more than probable that it was an ebullition of defendant quite as likely intended for the article as for the individual. Defendant admits that he told plaintiff she could leave the house, but denies that he threatened to put her out, and it is conceded by both that very soon thereafter he endeavored to induce her to return and offered to build her a house, etc.

I have stated the physical acts relied upon as constituting extreme cruelty. In my opinion they did not justify plaintiff in believing that she was in serious or in any danger, and were, measurably at least, induced by herself. Does her leaving the house constitute an act of desertion incurable upon his part? Says the Code: "If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce returns and offers in good faith to fulfill the marriage contract and solicits continuation, the desertion is cured." And to the same effect are numerous authorities. (Bishop, Marriage and Divorce, 784.) In this case it was admitted that the day after plaintiff left the defendant the latter repaired to the place where she was, with a carriage, and made every effort to induce her to return and live with him; that this was several times repeated and always refused. I think this conduct upon the part of these parties brings them within the provisions of the Code above cited.

Upon the whole case, while defendant appears to have a violent temper and an unamiable disposition, there seems to have been a plentiful lack of consideration on the part of plaintiff. In conclusion, it may be suggested that the form in which plaintiff here seeks relief is not one that is favored by the Courts. A judgment which separates without divorcing, which interrupts one marital relation and still leaves any other impossible, has been very generally regarded with disfavor, as conducive to dissoluteness and immorality; and while the Code does give this form of relief—and it is to be applied by the Court when a proper case is presented—the Court will not be disposed to give any violent or strained construction to facts or conduct in order to force parties into this unnatural and most equivocal position. The plaintiff takes nothing by her bill.

SARAH G. TULLY vs. JOHN TULLY ET AL.

DECISION RENDERED FEBRUARY, 1886.

This action is brought by plaintiff against the defendant John Tully to obtain a divorce on the ground of extreme cruelty, and also of adultery, alleged to have been by him committed with divers females named. The other defendants are the children of John Tully by a former marriage, and are made parties upon account of their property relations in this case.

John Tully in his answer denies all the allegations as to cruelty or adultery, and further replies that the plaintiff has been for over ten years last past, and was long before her marriage with him, well acquainted with the character and habits of this defendant; that they have been known to her at all times, as since said marriage and as they now are; that plaintiff married this defendant with full knowledge of his character and these habits, and that she should not now be heard to complain as to these matters.

As to the charge of adultery, it is sufficient to say that by the proof of former illicit relations re-established by defendant since his marriage, of correspondence with lewd women, of appointments and clandestine meetings, of public and indecent familiarities, and by the testimony of eye-witnesses, the defendant's adultery is conclusively established. The fact of adultery the defendant denies, and, while he admits associating with certain of the females named, asserts that he did not know, nor did he have any reason to suspect, that they were not virtuous and respectable women. Such denials upon the part of the defendant cannot in any way weaken the effect of the evidence upon that point, but it can and must very effectually discredit the defendant when speaking as a witness to other matters in which the evidence is perhaps not so irrefragable.

Says the Code: "A witness false in one part of his testimony is to be distrusted in others." (Sec. 2061, C. C. P.) And this has been held to mean, not that the Court *may*, but that it *must*, discredit such witness. The denial of the defendant as to his relations with certain women, and his opinion as to the character of others with whom he was openly associating, was material in the case and was willfully false, and will be regarded with distrust as to all other matters as to which he has testified.

With this determination as to the issue of adultery, under ordinary circumstances, the case might be disposed of Under the peculiar issue presented by the answer it becomes necessary, however, to go further, and pass, not only upon the issue as to the cruelty, but also as to the antecedent character and conduct of the defendant and the plaintiff's knowledge of his character. The plaintiff testifies with minute particularity to a continuous and persistent system of brutalities towards her upon the part of the defendant. As to much of this she is corroborated by other witnesses, and while some of this treatment, as depicted, is revolting enough to stagger ordinary credulity, it is not so entirely at variance with the established character of the defendant as to be rejected on that account. Much of this the defendant denies, but with the discredit which the law establishes as to him, I see no reason to doubt that defendant has treated plaintiff with the most persistent, ingenious and inhuman cruelty.

Did the plaintiff know the character of the man she was marrying, and that this was the treatment which she had every reasonable ground to anticipate? And if this were the fact, and this her knowledge, what consequence does the law attach thereto? For the defendant it is insisted that the plaintiff cannot now be heard to complain of a character which she knew, and of treatment which she had every reason to expect, and this assertion is not without some support, as well in reason as in authority. I shall therefore first enquire as to the facts, and, secondly, as to the probabilities of plaintiff's knowledge of them.

The evidence shows that in the year 1852 the defendant came to California and took up his residence in Santa Clara County; that he was then married and he became the father of a very numerous family; that for the first twenty years of his residence here he was notably thrifty and industrious and exceptionally successful as a farmer; that by the exercise of these qualities he accumulated property, mostly agricultural land, of the value of over $100,000, and that during these years he was reputed to be a moral, sober and respectable citizen; that about ten years since, and while his first wife was yet living, a marked and complete change appeared in his character and conduct; that he became very intemperate, resorting to the lowest of places and using the vilest of liquors; that he also began associating with prostitutes, and that his debaucheries of every character were carried on in the most conspicuous and shameless manner. In fact to depict the career and conduct of defendant during these years, as portrayed by the witnesses, it is difficult to avoid the appearance of exaggeration, or the suspicion of some mental unsoundness on the part of defendant. As one of the witnesses who had attended him for many years as a physician expressed it: "For drunkenness, lewdness and shamelessness of the vilest kind, and with the vilest means, and the vilest people, the defendant has been for the past ten years a moral phenomenon."

It is further in proof that during all these years these debaucheries of the defendant were constantly bringing him before the Courts and were the subject of constant reference and comment, not only in the newspapers of this city, but of the State; that he was often named in connection with some filthy escapade; and it may be conceded that in the annals at least of this county no one person has in the last ten years made himself so frequently, so notoriously, so shamelessly conspicuous. The averment of the defendant's answer in that respect is established beyond cavil or controversy.

Did plaintiff in February, 1884, when she married the defendant, know this to be his character? The answer to this will be found in an enquiry as to her opportunities for learning, as also of her capacity for estimating.

The plaintiff was born in 1856, and is wanting in neither mental capacity nor personal attractions. In 1871 she became a boarder in the College of Notre Dame in San Jose, and there remained until 1876. At this school there were during all these years a large number of other scholars, boarders in the Convent, besides many day scholars. Boarding at the same school during this time were two daughters of the defendant John Tully. With these girls the plaintiff became intimate, and was an occasional visitor at the house of their father during the lifetime of his former wife. In March, 1882, the former wife of John Tully died. Soon after plaintiff visited the family of defendant and remained two weeks, and in September of the same year she was there about one month. In January, 1883, she was at the place one night. Upon more than one of these visits the defendant was drunk and conducted himself in a very violent and offensive manner in his family. The plaintiff testifies that she knew that defendant "was intemperate and in the habit of going upon sprees," but denies that she knew or had heard of his other immoralities. She further states that the secular papers of the town were not permitted to be read in the Convent, and that she neither saw nor heard what they are reported to have published concerning defendant.

In this statement of plaintiff that she did not know of the lewdness of defendant she is contradicted by at least three witnesses, two not connected with either of these parties, who state that this conduct of defendant was the subject of frequent conversation between themselves and plaintiff, and that she knew all about it, and both before and after the death of Mrs. Tully frequently expressed herself upon the subject with the utmost sympathy for the Tully girls and great indignation towards the defendant. Independent of these positive statements, it seems to me highly improbable that in her situation, and with her associations at the Convent, she should not have learned the shame and mortification—matter of universal knowledge—that their father was bringing upon his daughters, then her associates and friends. With the many facilities afforded, it is no disparagement to the watchfulness of the Sisters of the Convent that an occasional journal from the outer world should elude their vigilance, and find its way within these secluded precincts; and that all these young ladies should neither know, nor care, nor comment upon a matter of this character, affecting as it did the family of two of their schoolmates and associates, is an exhibition of unquestioning simplicity as delightful to contemplate as it is difficult to credit.

It is impossible to believe that, with these surroundings, John Tully's misdoings were not the theme of frequent and indignant comment among the friends and schoolmates of his daughters. In my opinion, the plaintiff, long before her marriage, was fully informed as to the conduct of the defendant, and had thoroughly and accurately estimated his real character.

I have already stated the defense predicated upon this assumption. Was the treatment which plaintiff had received at this man's hands such as she was warranted in anticipating from her estimate of his character? In my opinion it was not. She knew she was linking her fate with a drunkard and a libertine, one who had been false in his former marital relations and foul in all his vile associations, and she might well have known that with this man she was wedding the neglect, the harshness, the ill-treatment that is generally the lot of the drunkard's wife. She knew of his infidelities, and that they had sent a former and most amiable wife in shame and sorrow to her grave, and she might well have anticipated, when she gave herself to his polluting embraces, that he would be no more constant or faithful to her. But she could not have foreseen that he would make of his foul liaisons a constant boast to her; that he would have paraded his lemans before her and contrasted their attractions with her own; that he would have accused her of the vile practices he was avowing for himself, and have heralded her as a harlot in the crowded thoroughfares of a great city; that to insults and reproaches,the most bitter and shameful that a woman can suffer he would add the menaces and the efforts that perilled life and the assaults that bruised and wounded the person—in short, that he would leave no means which diabolical ingenuity could suggest of mental or physical torture unemployed, by which her very existence would be made intolerable.

Shocking, reckless as was this ill-starred connection; little of hope or of happiness as any one would have anticipated from it, no one could have forecast the measure of insult, of indignity, of abuse which this woman has suffered.

Common humanity, decency, command that this hideous relation be ended. It was well nigh a sacrilege when it was assumed at the altar. It is a continuing profanation that it be suffered to endure longer.

What order shall be made as to the maintenance of this plaintiff? In ordinary cases this question is not one difficult of solution. Usually the Court has before it but a party wronged and a wrong-doer, and it does not endeavor to balance with very delicate scales the reparation that money is to bestow. When in such a case the transgressor has made all the atonement that money can afford, he has made but imperfect compensation for affections blighted, hopes crushed, and a life wrecked; and it is no weakly sentiment—it is but retributive justice—that in such a case strips the one, that it may compensate the other.

This plaintiff presents herself with no claims to such consideration. Affection, hope, fond anticipations for the future have not been lost; they were never bestowed. Self-respect, social position, the esteem of the world—these were renounced by the plaintiff when she gave herself to this man at the altar. Considerations like these have no place here, for they have never existed.

There is, however, a child born since these proceedings were instituted, alike blameless for the wickedness of the one parent or the recklessness of the other, and this child is to be maintained. For the mother, too, some provision is to be made. What shall this be, and how shall it be afforded?

The evidence shows the defendant to have been possessed of land of the value of about one hundred thousand dollars, and indebted about twenty thousand. All this property he conveyed to his children by his former wife immediately after the commencement of this suit.

This Court is in no way embarrassed by this conveyance. It will find no difficulty in making such interest as it awards this plaintiff a charge upon some part of this property, and leave undisturbed the principal of defendant's gift to his children. Plaintiff insists that in making this provision the Court shall set apart to plaintiff a gross sum for her present disposition, and sufficient in amount so that the interest or revenues shall afford her a liberal maintenance. Defendant denies that the Court possesses that power.

I do not propose discussing this as a question of power, for all admit that it is one of discretion. In the exercise of my judicial discretion I shall not make of this allowance a gross amount. I have already characterized the action of this plaintiff in forming this alliance as a violation of all the canons of prudence and propriety, and I do not now propose bestowing upon conduct which I have thus judicially reprobated a dower larger than usually rewards the efforts of a lifetime of industry, thrift and economy; nor is any reason suggested why this plaintiff should be maintained for the residue of her life in idleness upon this estate. This would not have been her situation had she remained the wife of John Tully. It is not the condition of useful and deserving wives throughout the community. I do not know that the plaintiff anticipates any such life, I presume she does not. A very modest maintenance will represent her merits in this marital relation, and will have to suffice for her needs. Nor can that provision be regarded as meagre which to nine-tenths of the most deserving in the community would be considered opulence for the maintenance of a family.

If in the provision I am now making I shall err in awarding either too much or too little, or shall the position of these parties hereafter materially change, the decree can always be amended to conform to such changed conditions, and will for this purpose be kept open. The

judgment will be that plaintiff have the divorce prayed for, upon the grounds both of adultery and of extreme cruelty ; that she do have the custody of the infant child ; that the temporary alimony allowed for her maintenance be continued in all respects as at present for two months longer ; that from and after the expiration of said period of two months she be allowed and paid from and out of the property described in plaintiff's complaint the sum of fifty dollars per month until further order of Court ; that to secure the payment of this allowance these defendants, or a commissioner to be appointed by the Court to act in their name, do make and execute upon such part or portions of said real estate as the Court shall direct a mortgage conditioned to secure the payment of this allowance, or of such other or further allowance as this Court may direct. Let a decree be prepared and submitted in accordance with the findings filed in this case, and with this opinion.

HAMILTON vs. HORSE R. R. CO.

CHARGE TO JURY. DELIVERED MARCH, 1886.

The following is a summary of the instructions given:

1. Even if the boy who was killed had had a free pass, the defendant was bound to exercise only ordinary care for his safe carriage.
2. Testimony going to show that Hickey, the driver, made the admission that he had accidentally pushed the boy off while opening the car-door does not establish the fact itself. Such testimony is to be regarded only as discrediting Hickey's testimony at the trial that he had made no such admission.
3. If the boy approximately caused his own injury or death or contributed to it, there can be no recovery.
4. If the mother as custodian of the boy consented to his occupying a position of apparent danger on the car, the defendant is not liable, unless the boy exercised the prudent care of an adult.
5. A conclusion as to how the boy fell must be based on legitimate evidence. If nothing more than surmise appears, the jury must find for the defendant.
6. The negligence of the driver as the servant of the company must be affirmatively shown in order to entitle the plaintiff to recovery. If Hickey's negligence be only surmised, the jury must find that there was no negligence.

Judge Belden continued by saying that the defendant is a common carrier. It is agreed that the plaintiff's son was run over and killed, but sympathy and sentiment must be understood to be quite distinct from legal obligations. Upon each citizen the law fixes certain duties, and it fixes his measure of obligation. Much law has been quoted which may have been the guiding rule a hundred or five years ago, but which has now given place to more enlightened judgments. The jury and the Court must take the law, not as it was or as it ought to be, but as it is.

That the boy was a gratuitous passenger, paying no fare, is not disputed, and the Court instructed the jury that for this reason there is a different rule of accountability as to him from that which would apply to a passenger paying fare. If the boy was on the car by the consent or the invitation of the conductor, he was not a trespasser precluded from recovering if other conditions were favorable.

A common carrier of passengers for hire is held by law to the highest degree of diligence—he is bound to see that the greatest caution is exercised and that the greatest care and prudence is observed.

When the passenger is carried without reward the Code directs that the carrier must use ordinary care or diligence.

In view of this distinction, the statute being the final and controlling authority and the boy not having been a passenger for reward, only ordinary skill was required. The defendant was thus not bound to exercise the very highest skill, as to the use of cars of the best construction, as to their operation, etc. The measure of ordinary care is that which would be exercised by an ordinarily prudent and careful man were the risk all his own. The jurors will determine from their observation what constitutes ordinary prudence. The jurors themselves will not, of course, find an inflexible standard in themselves, for some men are bold and venturesome to the highest degree and others timid and cautious to the verge of cowardice. The jury must find the mean, and then inquire whether the conduct of the defendant was in accordance with ordinary prudence.

It is claimed by the plaintiff that the car-door is of negligent construction. The defendant asserts it is such as is commonly used. The negligence of the builder is the negligence of the company, but the jury may consider whether such a door is in general use and not regarded as a means of danger.

If the mother as custodian of the boy permitted him to occupy his place on the car, the company is released from liability to her. Such permission forecloses the right of recovery by the parent, though it may not on the part of the child; otherwise parents might put their children in perilous positions, and in case of injury recover compensation for the result of their wrong-doing.

The question for the jury to determine with regard to the car-door is: Would an ordinary prudent carrier use such a door? If the defendant is liable at all, it is on no other basis than this.

The alleged negligence on the part of the driver is a question of fact for the jury to decide, and the Judge further instructed the jury that an active, vigorous boy does not come within the same class as an infant or a paralytic man in respect to the care of the driver. The age, too, must be considered. A child of two years requires much more care from the driver than an intelligent active boy of eleven years.

The question whether the defendant was guilty of negligence and disregarded the rules of ordinary care in permitting the car-door to slide outside the car is one for the jury to determine.

No surmise is allowable as to whether the boy was thrown from the car by the sliding of the car-door, for there are many other ways in which the accident could occur with fatal result. The boy may have lost his footing and slipped, or been thrown under the car in some other way.

The law fixes no limit as to the measure of damages, should the jury find that the defendant is liable, and the father who should undertake to figure upon the value of his child's life would not deserve one dime at the hands of any jury. The amounts mentioned in complaints in cases of this kind may be taken simply as filling a blank, and in estimating damages in this case, if any are given, the jury should consider the severed relations of father and son, and the affections and ties of the family. If these be found to have been lightly cast aside, that fact should also be considered.

LAWLAER vs. O'CONNOR.

DECISION RENDERED MARCH, 1886.

This action is brought by plaintiff to recover from defendants $9,290, alleged to have been the value of certain horses, cows, hogs and wagons by plaintiff owned and possessed upon the 28th day of February, 1881, and by these defendants upon that day disposed of and converted to their own use.

Defendants deny that plaintiff was ever the owner of any part of the property described, and further plead in bar of any asserted cause of action the Statute of Limitations of this State.

This, in the strict sense of the term, is the common law action of trover. To recover, the plaintiff must show himself to have been the owner and entitled to the exclusive possession of the identical property converted at the time of the conversion. There is no evidence before the Court tending to show that any one of the animals, or of the articles, alleged to have been converted by defendants, were ever owned or possessed by plaintiff, or that they were the progeny of any animals so possessed. Upon this ground, if no other, plaintiff's action must fail.

It has been insisted, however, upon the trial, that plaintiff was entitled in some form to relief, and plaintiff was permitted to go fully into the circumstances upon which any claim against these defendants might be based.

Assuming plaintiff's assertions to be well-founded, they exhibit a claim against these defendants in the nature of a co-partnership and a right to an accounting as such. To such a contention it may be well said that not only are the present pleadings quite insufficient, but, assuming this to be the fact, the defendants not only have the right to proper pleadings, but also to an account of their advances, expenditures, etc., all of which are of necessity embraced in a co-partnership accounting. The testimony as to whether there was any such relation between these parties was, however, fully gone into, and that farther and fruitless litigation may be, if not avoided, at least not invited, I shall examine the evidence upon this point.

Partnership, it is well understood, is a contract relation, created by the agreement of parties. It is not essential to its formation that there be any formal agreement. Where the dealings and conduct of the parties are such as usually characterize a co-partnership this relation will be presumed to exist. In the present case it is not claimed that there was any such agreement or understanding in terms. Plaintiff does not claim there was; the defendants all assert that nothing of the kind was ever pretended.

Do the dealings and transactions of these parties show a partnership in fact, as between plaintiff and these defendants?

In April, 1871, the plaintiff, then about 41 years old, and the owner of a horse and cart, married Mary O'Connor, then a widow with four boys, here defendants. The oldest of these boys was then about 16 years of age. Mrs. O'Connor, at the time of her marriage, was possessed of little or no property, and supported her family by washing. At this time the two older boys, John and Timothy, were working, and aided, with their wages, their mother in the support of herself and her two younger children.

Soon after his marriage with Mrs. O'Connor, the plaintiff, with his wife and the two younger children, moved upon some sort of a squatter claim in Alameda County. He was soon dispossessed of this, remaining upon the place only about two months. He then removed to Oakland, worked for about two weeks in a car-stable, and then removed, with all of these boys, to a place near Gilroy. During this time the older boys were working for wages, and much of their earnings were given to support their mother. After coming to Gilroy the family went to live upon a tract of mountain land. Lawlaer and his wife lived upon the place, the boys worked for wages, and with their earnings bought calves and other stock which they placed upon this land.

In 1875 the whole family removed to Marin County; they there rented a place with money earned by the boys, John and Timothy, and placed upon it the stock and cattle, that then had increased to some fifty or sixty head. In 1877 the family returned to near Gilroy, and Timothy purchased with his earnings the tract of land upon which they had before resided. After their return to Gilroy, the boys continued as before to purchase calves, cattle and hogs, and also worked whenever the opportunity offered, and applied their earnings to the purchase and improvement of their property.

During most of this time plaintiff was crippled from rheumatism and did not attempt to work. He occasionally did some light chores about the place and helped upon a few occasions to build or repair brush fence or to feed the calves. The family were, during all this time, supported by the earnings of the boys, and plaintiff's contributions amounted, in all, to but a small portion of his own maintenance. At the time plaintiff first removed to Gilroy he owned two or three horses; only one of these was of any value. While in Gilroy a bull calf was given him by a neighboring farmer. This was taken to the place occupied by the family and there raised, and there it died. The horse and wagon that plaintiff originally owned were traded by him in different ways until the ultimate proceeds were a small sum of money, of which part was given to his wife and part was retained by himself. All the property exclusively possessed by plaintiff at any time did not exceed two or three horses, one wagon, a calf and a cow, which he acquired in some of the exchanges that were constantly being made upon this place. The foregoing are the facts upon which plaintiff relies to establish not merely a joint interest in this property, but himself the exclusive owner of all the earnings of these four defendants during a period of about twelve years.

The defendants and their mother, the wife of plaintiff, all testify that during all this time plaintiff was not only not able to support their mother but unable to support himself; that to prevent their mother actually suffering for food they were compelled to take her to their home, and that out of regard for her feelings they permitted plaintiff to accompany her; that he earned nothing and did nothing, and that only once during all these years did he attempt to perform any regular labor; that he once undertook to work at harvesting, but worked for only a couple of weeks, and that he then returned to their place as before. The interest of the individual parties to this action may be deemed equal upon this proposition. As to the nature and extent of plaintiff's services, numbers are certainly with the defendants.

Did the plaintiff during all this time suppose that he had an interest with these boys in this property? A few very significant circumstances will answer this inquiry. The plaintiff himself testified upon the present trial that he had never heard nor "supposed until the trial that the defendants were partners to this stock." While the family were living in Marin County, John O'Connor gave in the stock, cattle, etc., as his own, to the assessor, and Lawlaer gave to the assessor, as all of his property, a horse and wagon. The same year plaintiff was sued by Dr. Gildersleeve for medical services and this horse and wagon were attached, and he procured witnesses before the Justice and established the fact that this was a team with which he earned his living and that it was exempt, and upon that ground secured its release.

In 1873 Lawlaer with his wife went to San Luis Obispo for the purpose of taking up land. He remained there about two months and then returned to the town of Gilroy. In Gilroy Mrs. Lawlaer rented a small house for $6 per month and endeavored to support herself and husband by washing. She afterward rented a still cheaper house for $4, and continued her efforts as before. During this time Lawlaer simply did chores about the house. Mrs. Lawlaer was not able to support herself and Lawlaer, and herself and furniture were put in the street by her landlord for the non-payment of rent. While so in the street, John O'Connor, whose place was about thirty miles from Gilroy, came in town with a team. He gave his mother some money and told her to go back with him. She asked if she might take the old man (Lawlaer) along. John said she might, and the next day took them to his place, where plaintiff remained until 1881.

In 1878 the plaintiff took up a homestead claim upon a tract of public land about eleven miles from the place occupied by the O'Connors, and in 1881 he left the O'Connor place and his wife, went to this place, and did not afterward return to the O'Connor place.

In 1883 he commenced in a Justice Court an action against John O'Connor to recover a horse, one of the animals used by them upon this place, claiming it to be his property. In this action he was defeated. Other and minor facts of the same general character are in evidence.

I shall briefly suggest the conclusion indicated by the facts above recited: When plaintiff gave in his horse and wagon to the Assessor of Marin County he knew that the O'Connors were then being assessed for the property they were holding in that county. If this horse and wagon which he now claims were part of his partnership interest were such, he knew that, to the extent of this property, it was being assessed twice—once as given in by himself, and again as the O'Connors'.

When he asserted against the claims of Dr. Gildersleeve that this was all the property he possessed, and that it was upon that ground exempt, he must have known whether or not he had an interest in about one hundred head of cattle, then possessed by these boys. If he did so know his statement to the contrary was simply perjury—by himself, or subornation of perjury through another. I see no reason to give this action such construction.

When in 1873 he went with his wife to San Luis Obispo to establish a home, it is unreasonable that he should not have called upon these defendants for some part of the property of which he now claims to have been possessed, or that he should not have requested some account of his interest in it.

When he returned to Gilroy absolutely impoverished, it is incredible that he should have permitted his wife and himself to have been put out of their house and into the public street for the pitiful rent of $4 per month if he had been at the time a partner and interested in a valuable herd of cattle, then in charge of his partners, and in the same county.

It is inexplicable that in 1878, with this interest, he should have taken up, upon his own account, and in a remote part of the county, a homestead claim for his own residence; that in 1881, without calling upon these alleged partners for assistance, division of property, or accounting, he should have left this place and removed himself to this remote tract of land; that in 1883, and long after his friendly relations with these defendants had wholly ceased, he should have sued one of these defendants for one of these animals only, and omitted all claim to the rest of the property, had he pretended to any such claim.

No prolonged discussion is needed to show the significance of this undisputed conduct by the plaintiff. It is wholly irreconcilable with either the theory on which the plaintiff sued (that he was the exclusive owner of all this property) or of the one upon which I have thought advisable to consider it, that he was a partner of defendants in this ownership. I shall briefly examine the facts relied upon by plaintiff:

First.—That the plaintiff gave to his wife the money he earned and that it was by her applied to the support of herself and her two minor children then part of her family.

In the first place, it does not appear that during the whole nine years that these parties lived together plaintiff contributed in this way one hundred dollars—certainly a very meagre contribution for the maintenance of even the husband and wife. Had he done far more—had he during all this time furnished the entire and ample support for his wife and her minor children—it would have been doing no more than the law required of him. It was his duty to support his wife, and it would be a singular conclusion that the meagre pittance he has thus furnished should make him partner in all the earnings of all his adult step-children.

It is further testified by George Bennett that in 1881 he went to the place to look at the cattle with a view to purchasing. That Jerrie, one of the boys, told him "the old man" (Lawlaer) said they must have the money down for the cattle. Without considering the quite inconsequential character of this statement, and assuming that it was accurately understood and remembered by this witness, if it was intended to state that plaintiff in any way controlled or interfered, either in the management or disposition of this property, it was utterly groundless, for the plaintiff himself over and over repeated that he had nothing whatever to do with either the management or disposition of the property, that that was wholly attended to by the boys.

The facts of the occasional work, chores, etc., that were performed by plaintiff upon the place, are quite consistent with the position which he held in this place—that of an infirm and helpless man—the husband of defendants' mother, and maintained by them in consideration of this relation.

I have thus examined the facts of this case and estimated their value as though this was an ordinary dispute as to the rights of these parties, independent of any domestic relations. Where, however, such relations do exist, a very different rule applies. The implied obligations which are assumed, as between strangers, no longer obtain, but it is assumed that services rendered, benefits received, and advances made, are liquidated by corresponding benefits usually moving between the members of the same family. In all such relations, implied obligations are not favored, positive agreements are required as the basis of legal obligations. Says a legal writer upon this branch of the laws: "In such a case facts and circumstances are required which show that both parties at the time the services were performed contemplated, or intended, pecuniary recompense. The declarations of parents in matters of this sort, if somewhat vague, are not apt to be construed in the child's favor, and, on the other hand, the presumption is equally against regarding the services of a father who lives with his son and does work for him as rendered for compensation, although that may be shown by evidence of a contract. (Schouler, Domestic Relations, 269.)

"In these cases the presumption of compensation from services performed is not favored, and must be overcome." (Ibid. 274. See, also, Freirmuth vs. Freirmuth, 46 Cal., 44.)

The rule here indicated is in my judgment not only a sound, but an eminently humane one. There are few families in which aged and infirm parents, adult children, or needy and helpless relatives or friends, do not find shelter and aid, and do not in return render such services as they are capable of performing without any thought of pecuniary recompense upon either hand. The rule that should imply any legal obligations from such considerations could but disturb such relations, and the promptings of duty, of kindness, and of charity would often be repressed from considerations of prudence or the fear of legal accountability.

The case at bar is clearly within the rule of the authorities above indicated. The obligation asserted is not only without any express agreement for its support, but the circumstances under which the implied obligation is claimed are of the most trivial character, wholly neutralized as to their effect by the conduct of the plaintiff himself, and contradicted by the overwhelming preponderance of the testimony. Judgment for the defendants for costs.

TARWATER vs. SMITH.

DECISION RENDERED APRIL, 1886.

This is an action brought by plaintiff to obtain against the defendant a decree for the specific conveyance of a tract of land particularly described.

The testimony shows that plaintiff is the son-in-law of the defendant and resided in Contra Costa County. That during the latter part of the year 1884 there had been some negotiation between the defendant and one W. D. Jones for the purchase from the latter by the former of a tract of land of about 106 acres. That while so in negotiation the plaintiff visited the house of the defendant, and it was then suggested that an adjoining tract, owned by Jones, and containing about 155 acres, should be purchased as a farm and home for the plaintiff.

Acting upon this suggestion, the negotiations with Jones were extended so as to include the two tracts. And the two were upon the 28th day of March, 1885, by one deed and in one description conveyed by Jones to the defendant C. C. Smith. In the negotiation for the purchase of this land it was understood that the tract of 106 acres was valued at $1,500 and the 155 acres was valued at $3,500.

The entire consideration paid was $5,000. The whole of this purchase price was borrowed by defendant Smith from one Schiele, and Smith gave to Schiele his (Smith's) individual note for $5,000, payable five years after date with 8 per cent. per annum interest, and also to secure the payment of this note gave to Schiele his mortgage upon the 261 acres then purchased from Jones and also upon a tract of 300 acres of land before that time and then owned by Smith. While these negotiations were going on Tarwater generally accompanied Smith, but the bargaining was done and the papers prepared under the direction of Smith. After the purchase in question, Tarwater, with the consent of Smith, went into the occupation of the tract of 155 acres, with his family, and cultivated the same with crops of grain and hay and there resided until about the month of October, 1885, when he removed from the place. During his residence upon this place the plaintiff placed no permanent or valuable improvements upon the same, nor did he at any time while so residing pay to defendant any part of the purchase money agreed upon as the value of said land, or as paid to Jones for the same.

The defendant at the time he was negotiating for this tract said to several persons and upon numerous occasions that he was purchasing this tract of 155 acres for Tarwater, and while negotiating for the sale of the same repeated this statement, and stated further that he could not sell until he had consulted Tarwater, and refused to sell upon certain conditions, assigning as a reason that Tarwater would not consent to the terms.

Before bringing this suit Tarwater made a contract with J. A. Clayton by which he assigned to Clayton his interest in this tract, and before this suit Clayton tendered to Smith $3,500 and interest and demanded of Smith a conveyance of this tract, which Smith refused to give. During the time that Tarwater was occupying this tract he agreed to pay to Smith for the use or rent of the same the sum of $280 per year. This amount was the exact interest payable to Schiele upon the $3,500 at which this 155 acre tract was purchased.

No memorandum in writing of any kind passed between Smith and Tarwater with reference to this land or to any right that Tarwater then had or was to thereafter have in the same. For the defendant it is now insisted that no agreement of any kind was made by Smith by which Tarwater was to have any interest in this land, and second, that if any such agreement was made it was in parol and void under the provisions of Sec. 852, Civil Code.

For the plaintiff it is insisted that Smith made this purchase as the agent of Tarwater, and that by so acting, and by thereafter letting Tarwater into the possession of this tract, the section above referred to is avoided and a contract thus circumstanced and evidenced is enforcible in equity.

Did Smith in making this purchase act as the agent of Tarwater?

Did he understand and was it understood by both that Tarwater was the real principal and Smith his subordinate and agent?

In my opinion it was not. With the situation and relations of these parties understood, it is impossible to believe that this was the agreed and understood position of these parties.

The negotiations began by the suggestion upon the part of Smith that it would be very pleasant to have his son-in-law and his daughter located near him. Tarwater was without any means. Smith was possessed of some property, and could procure credit. In the relationship existing between these parties, and the social purposes to be promoted, there is abundant explanation for all that was said and done by Smith without assuming that he proposed in this matter to act as the agent and subordinate of Tarwater.

In my opinion the expressions attributed to Smith, and in my opinion used by him, "that he was purchasing this for Tarwater," and "that this was Tarwater's place," are synonymous with similar expressions used by parents in referring to similar actions performed for children, and are wholly repugnant to any idea of agency or subordination as to right or obligation upon the part of parent to child.

While this conclusion, as matter of fact, answers the principal contention of plaintiff, it is not in my opinion necessary to its determination against the plaintiff. Had the fact of mere agency been clearly established the proof was only in parol, and to hold that while the "Statute of Frauds" prohibits sales of or trusts in lands by parol and still permit an agency by parol to do away with this restriction is to do away with the statute itself, and to permit by any equally inferior character of proof that to be done indirectly which may not be done directly. The other questions in this case are in my opinion settled by authority.

In Arguello vs. Eddington, 10 Cal., the leading case in this State upon this subject, the Supreme Court examined this question with great ability, and announced as conclusions that as essentials to a decree for specific performance for the conveyance of lands, when there was no written memorandum, the party must have paid the purchase money, and have been let into the possession of the demanded premises; or that having been let into possession he must upon the strength of the oral agreement have made permanent and extensive improvements for which adequate compensation could not be made, and which it would be fraud and bad faith to permit him to be deprived of. The doctrine of this case as to the essentials to such a recovery has not, that I am aware of, ever been called in question in this State, although the case is constantly cited.

Roberts vs. Ware, 40 Cal., is scarcely distinguishable from the case at bar. The facts as stated in the opinion of the Court are as follows:

"The defendant purchased the land and flock of sheep, paid one-half the purchase money, and gave his note, secured by mortgage upon the land, for the other half. The plaintiff alleges that it was verbally agreed between him and the defendant that they should be jointly interested in the purchase, and that the title should be taken in the name of the defendant for the benefit of both of them.

"It is not alleged that the plaintiff paid any part of the purchase money, but he avers that he signed and delivered to the defendant a note, blank as to date and amount, to be used by defendant in effecting the loan which was to pay for the land and the sheep.

"It is well settled that a resulting trust may be established by parol evidence, and the principle is equally well settled that such a trust will not arise unless the plaintiff paid the whole or some part of the purchase money, and unless the money so paid formed at the time some part of the consideration of the purchase."

Numerous cases are cited in support of this proposition, and others distinguished upon the ground that in them it did appear that the money which made the purchase was actually loaned by the defendant to the plaintiff.

The Court further consider certain subsequent acts of recognition by defendant of plaintiff's interest in this property, but say: "These facts cannot take the place of an averment that the plaintiff paid part of the purchase money at the time of the purchase, nor would such probative facts sustain that averment had it been made." Plaintiff cites with confidence the case of Walton vs. Karners, Vol. 7, No. 12, page 199, West Coast Reporter. In that case, as stated and as understood by the Court, "the whole of the purchase price for the land was paid by the plaintiff, while the defendant, under an agreement with him, received the contract for the sale of the land, and refused to convey when repayment was tendered. Held that the case was not within the statute." In the concurring opinion of Justice McKinstry he says: "Although a verbal agreement by A to purchase land for B may not be given in evidence to establish a resulting trust, when the entire purchase money has been paid by A, and the conveyance taken in his name, yet if any part of the purchase money is shown to have been paid by B a verbal agreement may then be proved which shall have the effect to deprive A of all beneficial interest in the purchase and to clothe the entire estate in his hands with a trust in favor of B."

Hidden vs. Jordan, 21 Cal., 92: "With this declaration that the purchase money or some part thereof must be paid by the party asserting the trust." This case is in entire accord with Roberts vs. Ware, supra, and the principles of Arguello vs. Eddington, 10 Cal.

In the case at bar there is no pretence that plaintiff paid any part of the purchase money, or that he even assumed any legal obligation to pay it. His right is based solely upon the parol agreement and a possession in which no larger expenditures or improvements were made than such as might attend the occupation of a mere tenant holding from year to year.

If there be any case which holds that such facts will sustain a bill of this character, I have been unable to find it, nor has counsel cited such case.

The declarations made by Smith to Morrow, Pearl and others do not help the plaintiff's case. Tarwater's rights in this controversy are to be determined by the actual facts, and not by the consequences of any misleading statements Smith may have made to others. Giving to those acts their largest effect, they leave the plaintiff clearly within the purview of the statute.

The plaintiff takes nothing by his bill and defendant has judgment for his costs.

HANNAY vs. HANNAY.

DECISION RENDERED APRIL, 1886.

This is an action by plaintiff to obtain from defendant a divorce upon the ground of extreme cruelty. The testimony produced upon the part of plaintiff to establish the charge of cruelty is of such a character that it does not admit of comment, and no good purpose can be subserved by any discussion of it. If credited, it establishes beyond all controversy a case of extreme cruelty against the defendant. While the defendant denies many of the charges made against him, these proofs come from so many quarters, from so many disinterested and independent witnesses, and are so in accord with and consistent with the general mass of testimony produced by both parties as to the disposition and habits of the defendant, that they cannot be successfully questioned.

The defendant, however, claims that plaintiff's conduct and treatment of him has been such that she should not now be heard to complain. If all the testimony taken to this point be credited, it must be admitted that the plaintiff has not in all instances, either by act or speech, conformed to the usual standards of womanly delicacy or decorum. It is not, however, pretended that she has been in any way unfaithful to the defendant, and the acts complained of are either the expressions of jealousy or sudden ebullitions of passion under provocation from defendant more or less offensive in their character.

As to many of these matters, plaintiff denies them. Conceding, however, that they are substantially proven, they appear to have generally occurred during contentions inaugurated by the defendant, and were in response to accusations and insults as cruel and exasperating as can well be imagined, and offered alike in the presence of the children of these parties and of visitors to the house. That the plaintiff should have listened with equanimity, or accepted with patience and in silence, abuse too vile for even the most guarded reference, is exacting and expecting altogether too much from human nature, and if the wrath which such treatment must inevitably cause occasionally takes form or finds expression in words or acts of questionable propriety, some allowance is to be made for the wicked provocation given and for the constant association and example under which she has acted. To the treatment to which plaintiff has been for years subjected by defendant I do not think she could be expected or required to submit with meekness or to respond with moderation, or that a husband can with justice complain if the retorts of his indignant spouse partake somewhat of the flavor of his own gross insults to her. I do not think plaintiff's conduct has debarred her the relief she here seeks, and the divorce prayed for will be granted.

The most difficult question presented in this case is the disposition to be made of the infant children, six in number, the oldest a girl of about ten years of age, and the youngest about sixteen months. That the defendant has a reasonable measure of affection for his children I make no doubt—most parents have, however derelict they may be in other respects, or however unfit they may be to have the charge and training of such children.

The parent that under any circumstances could use in their presence the language to their mother that is here shown, cannot be a fit person to have the custody and charge of growing girls.

The rule seems to be that the custody of infants of tender age, and of girls, is usually given to the mother, and this for obvious reasons.

The farther and general rule seems to be that where the divorce is granted upon the ground of adultery, or of extreme cruelty, the children will be awarded to the aggrieved spouse, the law not permitting the party already wronged in his domestic relations to suffer the farther pain of being deprived of any of his children.

This rule is, however, not an inflexible one, and is to be controlled by a just consideration of the surroundings and circumstances of each particular case.

In the present case the defendant is shown to be a man of a morose disposition, with a violent temper upon which he imposes no restraint, and which exhibits itself in words and deeds indescribably outrageous. It further appears that he is much addicted to the use of intoxicating liquors and is often under their influence. Were a Court called upon to appoint a guardian for a child, it is safe to say that the proven habits and disposition of this defendant would prove an insuperable obstacle to his selection. Upon what principle, then, can the Court require the mother of these children to surrender their custody to a person thus disqualified, even though that person be the father?

The infirmities of habit and disposition that make of the defendant so bad a husband equally disqualify him for the custody of girls, and the custody of all these children will be awarded to plaintiff. I have stated that this disposition is determined by the habits and conduct of the defendant as shown upon the trial. The continuance of that custody will depend upon the continuance of these habits. The orders made in divorce cases, especially those as to children, are always open to revision by the Court, and whenever, from the changed condition of the parties, or from any other cause, the modification of a former order is found advisable it will be made; but with the order permitting the defendant at all proper times to visit these children, their present custody will be awarded the plaintiff.

The property disposable in this proceeding is, so far as available, the separate property of the defendant, owned by him before his marriage with the plaintiff. A support from it and from the earnings of the defendant for herself and these children will be ordered. As the whole property is probably not worth over $5,000, and as the personal earnings of defendant in his business of a nurseryman are not large, $60 per month will be allowed for the support of plaintiff and her family.

CITY OF SAN JOSE vs. CARNRIKE AND GRAHAM.

DECISION RENDERED APRIL, 1886.

This is a civil action brought by the city to recover from the defendant the sum of $470 license tax for keeping and maintaining a place of amusement in the City of San Jose.

To this complaint defendants demur, and insist that the city cannot maintain an action of this character nor recover from parties in a civil action the price of licenses which they have never received, nor have been issued for them.

In the City and County of Sacramento vs. Charles Crocker, 16 Cal., 120, it was held that the city could recover in this form of action for licenses which the defendant should have taken out, under the ordinances of the city, but had not.

In Santa Cruz vs. Santa Cruz Railroad Company, 56 Cal., 150, an action brought in the same form and for the same purpose, it was held this action could not be maintained.

In the last-named case the Court considered the case of Sacramento vs. Crocker and distinguished between the two. Say the Court: "An examination of the report of the case, however, shows that the judgment turned upon the power given to the corporation by its charter 'to levy taxes and to cause the same to be collected,' and an ordinance passed under and by virtue of that power. The language of the 'Act to reincorporate the City of Santa Cruz' is more restricted than that employed in the Charter of Sacramento. The thirteenth section of that Act reads: 'The Common Council has power and it is hereby made their duty to provide by ordinance for the levying and collecting of all city taxes, and in so doing shall be governed by the State laws in reference to the levying and collecting of State and county taxes, so far as applicable, etc.'"

These are recitals from the Sacramento City Charter by which the action against Crocker was upheld.

Section 11 of the Charter of the City of San Jose is a verbatim repetition of the section above cited, and was probably copied from it.

By ordinance the City of San Jose duly enacted it, and further provided that "any person or persons failing to take out a license as herein provided shall be delinquent, and any person thus becoming delinquent shall be required to pay to the City Collector, for the use of the city, an additional ten per cent.," etc., * * * "and shall be subject to the pains and penalties prescribed in this Act," etc. * * *

This ordinance in unmistakable terms provides cumulative remedies. One, the recovery of the amount which the party should have paid for the licenses required. The other, fines and penalties for prosecuting the business without such license.

With this recognition of the authority of the Sacramento case and the identity as to the Charter and power of that case at bar, this action can be maintained.

There is a feature of the Santa Cruz decision, however, which calls for consideration. Say the Court: "Assuming, but in view of the other sections of the Act not decided, that the Common Council might, by ordinance, provide for the collection of licenses in an ordinary action brought before a justice of the peace, the complaint does not recite nor refer to any such instance." (Ibid, 151.)

While the Courts will take notice of all matters of statutory enactment, and in so doing will usually take notice of Charters created by State legislation, the same rule does not apply to the ordinances of a city. These, if relied upon as a source of authority, or the basis of official action, must be proven, and, so requiring, proof must be pleaded.

With this the general rule, and with this intimation from the Court above quoted, I think the complaint should recite, or in some form refer to, the ordinance under which "persons becoming delinquent shall be required to pay such delinquent taxes to the City Collector for the use of the city."

To enable this amendment to be made, the demurrer will be sustained, with ten days to plaintiff to amend in that or such other matters as he shall be advised.

DAWSON vs. WADE.

DECISION RENDERED MAY, 1886.

The facts of this case show that defendant and one Michael Dawson, the predecessor of plaintiff, were in the year 1864 the owners and in possession of contiguous tracts of land, holding the same under Mexican grants. That in that year some questions arose as to the division line between these respective tracts; and the parties then procured a surveyor, Reed, to run said line. That Reed went upon the ground with Dawson and Wade, and, establishing an initial point at the remains of a former bridge, ran their line in accordance with what he then understood to be the calls of the former surveys. That both parties then present agreed upon this as the initial point, and the division line of their respective tracts; and the defendant proceeded to plant willows and build fences upon the line so surveyed and agreed upon, and ever since has maintained a fence upon a considerable portion of said line, and has asserted and exercised ownership upon the whole of said tract up to this agreed line.

The line so run was not in fact the true line, but was a few feet to the right of it, and upon the land of plaintiff.

The ownership of the tract occupied by defendant has been all this time and long prior thereto in Estefano Wade, the wife of the defendant, Charles Wade.

The plaintiff holds by deeds from the City of San Jose as successor to the Pueblo of San Jose; the patent to these lands did not issue to said City of San Jose till the year 1884.

Upon those facts defendant claims that by this agreed line and continuous occupation the plaintiff is now estopped from asserting the true line, or any or other title to this strip of land.

The plaintiff contends that as the ownership of this land was in Estefano Wade, then and ever since a married woman, she is not estopped as to the same by any act of her husband, and that as estoppel must be mutual, that plaintiff is correspondingly released from the effects of such agreement.

Second.—That the fixing of this line was by a mutual mistake, and that neither party is therefore bound thereby.

Third.—That as the patent of the United States was issued to plaintiff's grantor within less than five years last past, a new right of action is given thereby, unaffected by the former agreement, possession or occupation of the defendant.

In Bird vs. Malleck, tried in the District Court of this county, the objection was made that a married woman could only bind herself, as to her real estate, by deed, and that no presumption followed from her acquiescence, however prolonged. This Court held that she was bound by such acquiescence, as would have been a *femme sole*, and upon appeal this view was affirmed by the Supreme Court.

That this line was agreed upon by mistake was the precise point involved in Biggens vs. Champlin, 59 Cal., 110. Said the Court: "Under such circumstances it makes no difference that the parties in making the location acted under a mistake as to the true line. Acquiescence for so long a time (eighteen years) in the line as located is conclusive evidence of its correctness."

The further objection that the issuance of the patent gave a new or renewed a former cause of action was made in this case, and urged and combated in the briefs of counsel.

Though not referred to by the Court; it must have been deemed not well taken, as had it been considered sound it must have reversed the cause, or at least have compelled an examination of other points.

Independent of this case, I do not see the application of this proposition to a case like the present.

The patent of the United States gives a new right as against those who have held adversely to it, and for reasons that were fully explained in Honahan vs. Nesser, 18 Wall, 255, and Gardiner vs. Miller, 47 Cal., 570. But neither these reasons nor the principle of these decisions have any application to an amicable agreement mutually entered into and acquiesced in by the parties themselves; to hold that it could, would enable the party to question his most deliberate engagements, or deed, or other obligation, upon the issuance of the patent. Estoppel by act, by consent, by acquiescence, is as conclusive when the facts are shown as is estoppel by deed.

See further: Columbet vs. Pacheco, 48 Cal., 395; Whitman vs. Steiger, 46 Cal., 256; Cooper vs. Viera Steiger, 59 Cal., 283; Parker vs. Armenich (in this Court).

The judgment will be ordered for defendant.

LOS GATOS MANUFACTURING CO. vs. SAN JOSE WATER CO.

DECISION RENDERED MAY, 1886.

In this case plaintiff avers that it is the owner of a right of way for a water flume, also a strip of land leading from one terminus of this right of way to a certain reservoir; also of a flume on and over this right of way and strip of land; also of a dam in "Cavanaugh Gulch" by which its right of way and the waters which it passes are by it utilized and enjoyed; also of a certain reservoir known as the "head reservoir of Los Gatos Mill," together with a strip of land one hundred feet in width, connected therewith; also of a certain discharge or drain pipe connecting said head reservoir with the Los Gatos Mills, together with a strip of land eight feet in width upon each side of said pipe and extending the whole length thereof.

The several parcels of property above referred to are in said complaint particularly described and located, and plaintiff avers itself the sole owner thereof.

That the defendant gives out and asserts that it has some claim, right, or interest in these premises.

That these assertions are without color or foundation.

That plaintiff's title is clouded thereby. Wherefore, it prays that defendant be required to answer and to show and set forth its claim and that the same may be adjudged invalid, and the defendant perpetually enjoined, etc.

To this defendant answers. It admits the assertion by itself of interest in all this property but denies that the same is unfounded. Upon the contrary, it insists that it has of right a beneficial interest in all the property described by plaintiff in its complaint.

It alleges that it is, and before the commencement of this suit was, the owner of a tract of land specifically described, and which, it avers, includes the site of several of the parcels of land described in plaintiff's complaint.

The defendant further, and by way of cross-complaint, sets forth that it is the owner of a system of ditches, dams and reservoirs by which the waters of Los Gatos Creek are diverted and conveyed to San Jose and other places for domestic and other purposes.

It farther avers that it has by purchase and appropriation acquired the right to said waters.

It farther avers that by agreement with plaintiff it has acquired the right to so divert said waters at the tail of the flume of plaintiff, and after the same have been used as a power at the mill of plaintiff.

It farther avers that the plaintiff is threatening to place and is placing obstructions and barriers in the flume, in which defendant has an interest, and by which these waters are appropriated, by which defendant is prevented from using the same. Wherefore, it prays judgment upon all these matters and that plaintiff be enjoined from in any way obstructing or interfering with defendant in its diversion, use, or enjoyment of these waters.

To this answer and cross-complaint plaintiff replies by a motion to strike out and by a demurrer.

While these motions assail by sub-divisions and paragraphs parts of this answer, the argument was principally addressed to a single proposition: "That the defendant cannot, in this cross-complaint, bring into this controversy its general claims to this as a water right, or have adjudicated anything other than the specific parcels which plaintiff set forth in its complaint."

The question here presented is in no respect distinguishable from the one presented by the same parties and passed upon by this Court. It was then determined that this cross-complaint was not multifarious, and that the defendant could set forth all its rights and have upon them the one adjudication here sought.

The decision then made was principally based upon the decision of the Supreme Court of this State in Wilson vs. Castro, 31 Cal., 430, in which, upon an elaborate and exhaustive examination of the authorities collected from the decisions and text writers, the principles were announced which in my opinion disposed of this question.

It is, however, insisted that the Court mistook the facts set forth in defendant's cross-complaint, and, farther, that it was in error in its application of the law. The earnestness with which this is urged has induced upon my part a re-examination of the authorities upon this point.

They are abundantly cited and well considered, as well as arranged, in Pomeroy's Equity Jurisprudence. From this work I purpose drawing for the rule, as well as for its reasons, and also for such cognate cases as seem to me especially applicable to the case in hand.

In classifying the cases, says Mr. Pomeroy: "Second—Where the dispute is between two individuals, A and B, and B institutes or is about to institute a number of actions, either successively or simultaneously against A, all depending upon the same legal questions and similar issues of fact, and A by a single equitable suit seeks to bring them all within the scope and effect of one judicial determination." This learned authority then, stating many of the objections that have been made, adds: "These cases must chiefly belong to cases of the third and fourth classes. In cases belonging to the first and second classes, when the litigations are necessarily between a single plaintiff and a single defendant, by or against whom all the actions must be brought, there could not generally be any room or opportunity for the questions above stated" (Ibid, Sec. 251), and cites a multitude of decisions in which different parties, holding by different rights, were permitted to unite by reason of their common interest in the subject matter.

So in Massachusetts: "The plaintiffs, though they hold their rights under separate titles, have a common interest in the subject of the bill. They are affected in the same way by the acts of the defendant, and seek the same remedy against him. * * * The rights of all parties can be adjusted in one decree and a multiplicity of suits is prevented." (Cadigan vs. Brown, 120 Mass., 493.)

In Ballon vs. Inhabitants of Hephenton: "The plaintiffs were individual owners of separate mills on the banks of a stream, and each drew a supply of water for his own mill from a dam, higher up the stream, which had been built by all of these proprietors. The defendants had begun to draw water from this dam, not removing or in any way interfering with the structure, but simply diverting the water so that the supply for each mill was lessened and might be rendered insufficient. Held that the plaintiffs could join in one equity suit and restrain the defendants by injunction in order to avoid multiplicity of suits." (141 Gray, Mass.. 324.)

In Reid vs. Gifford, plaintiffs were the owners of separate parcels of land on a mill stream and of separate water rights in such stream. Defendant owned another mill-site on the same stream. He had cut a ditch or canal, by which he diverted the water from the stream and thereby injured all the plaintiffs in the same manner but in varying amounts. Plaintiffs united in this suit to obtain an injunction and to abate the nuisance. It was held that they all had such a community of interest in the subject matter of the suit that they could join in the bill. (Hopk., 416.)

The cases here quoted are instances in which distinct parties, as well as rights, were permitted to be united.

But, as says Mr. Pomeroy: "When the litigation is between a single plaintiff and a single defendant, none of these questions are involved, but the parties are permitted to unite whatever in an equitable suit can be brought within the scope and effect of one judicial determination."

The opinion I expressed upon the former presentation of this question I still entertain, and a more extended examination of the authorities as presented by the decisions and indicated by the text writers has but confirmed me in these views. The form in which this repeated litigation between these parties is now presenting itself is an apt illustration, not merely of the principle, but of the necessity for its enforcement.

The motion to strike out is denied. The demurrer of the plaintiff is over-ruled. Ten days to plaintiff to file such answer to the defendant's cross-complaint as it may be advised.

PEOPLE vs. DELMONLY.

DECISION RENDERED JUNE, 1886.

The defendant was prosecuted for a violation of the ordinance of the City of San Jose which prohibits the sale of wines, etc., in quantities less than a quart without first procuring a city license. He was duly convicted and sentenced to pay a fine of $10, and in default of such payment to be imprisoned in the City Prison. From this judgment, upon questions of law alone, he now appeals to this Court.

The principal propositions urged for appellants are:

First.—That the ordinance, which does not except domestic products from the allegation to exhibit a license, is in derogation of the State policy, it being contended that as the State, as to her licenses, and also as to licenses issued by the county, makes this exception, the cities of the State must make the same exception.

Second.—That the complaint charges two offences.

Third.—That the finding of the Judge is not supported by the evidence, it appearing from the testimony that the parties helped themselves to the wine and left the price of it with a person upon the premises without any apparent action on the part of defendant.

The first objection is fully considered and disposed of by the following decisions of our Supreme Court: Ex parte Ah Foy, 57 Cal., 92; People vs. Martin, 60 Cal., 153; Ex parte Stuart, 61 Cal., 374; Ex parte Walter, 65 Cal., 269; Ex parte Lawrence, May 25, 1886. The substance of these decisions is that the fact that the State introduces into one branch of her revenue or license laws certain exceptions or restrictions in no way affects the power of the city to deal with the same question and to impose taxes and exact licenses for the same business.

The second objection, that there are two offences charged, admits of question. The ordinance reads: "All persons engaged in the business of who shall sell or dispose of any liquors, wines, beers, etc., without procuring a license," etc. The complaint in the charging words reads: "Said defendant was then and there engaged in the business of selling and did sell and dispose of," etc.

It is insisted upon argument that to engage in the business "or to sell" are two distinct and independent offences maintainable upon wholly distinctive grounds and supported by different character of proof. This is perhaps so, and these conjunctive allegations are certainly trenching very closely upon prohibited ground. Is this objection so presented that it can now be taken advantage of?

The defendant in the first instance pleaded not guilty. He then by leave of Court withdrew this plea and filed a demurrer, assigning with other grounds that the complaint charged two separate offences. The pleader did not, however, state what these offences were, nor in any way indicate to the Court what were the offences, or either of them, which were thus improperly united. In his notice of appeal and in the assignment of error in his statement upon appeal the defendant does not assign the rulings of the Court upon the demurrer as the grounds relied on, unless the general statement that the rulings of the Court were excepted to may be taken as such assignment.

In my opinion, the party who objects that two separate offences are charged against him must state what are the offences so charged, in order that the Court may compare the offences so laid with the statute and see that two offences created by the statute are really set forth in the information or complaint. The same rule applies as to assignment of errors relied upon on appeal. The respondent has a right to be informed in specific terms what are the errors that will be relied upon on appeal, in order that while the record shall be made full upon the ruling thus called in question, it shall not be made uselessly cumbersome by matters that are abandoned. In the present case every ruling made upon the trial by the Justice was as fully called in question by the notice of appeal and by this assignment as are the two or three propositions that are now insisted on. Without deciding as to whether this objection could have been well taken, I am of opinion that it is not so presented that it can be availed of.

It may be thought that this disposition of the point is somewhat technical, but an appeal which rests exclusively upon errors of law is of itself technical, and a party cannot well complain that the rule which he invokes should be applied as well against as for him.

It is further objected that the parties helped themselves to this wine and paid for it without interference or solicitation upon the part of defendant. If this was the real fact of the case, of course the defendant should not have been convicted. Whether it was or not was for the Justice to determine, and his determination, if not conclusive, is entitled to great consideration. The artifices by which license laws and prohibition laws are sought to be evaded are numberless, and the device of a customer waiting upon himself without *apparent* action upon the part of the proprietor was long ago relegated to the tomb of defunct subterfuges. I make no doubt that the Justice estimated this feature of the defense at its proper value.

The judgment appealed from is affirmed.

MORRILL vs. INDEPENDENT MILL AND LUMBER CO.

DECISION RENDERED JUNE, 1886.

The decision of this case turns upon the construction to be given to a written contract executed between plaintiff and defendant. The character of this contract and the conditions that have arisen under it will be briefly stated.

E. P. Reed was the owner of 435 acres of timber land in the Santa Cruz mountains. The Independent Mill and Lumber Company was and is a corporation engaged in selling lumber in Santa Clara and the adjacent counties. Reed was the acting secretary of the corporation.

E. B. Morrill was a saw-mill man, familiar with the manufacture of lumber and the management of saw mills.

Morrill had upon the tract owned by Reed a saw mill, and also a full equipment of teams and implements necessary to cut and supply logs for a saw mill.

Upon the 11th day of September, 1884, and while these parties and these conditions were all as above recited, the plaintiff and the defendant, acting through and by Reed, then secretary, made and executed the contract in question. By the terms of this contract Morrill was to cut without culling the timber trees upon said tract and saw the same into saw logs. He was to saw at said mill "to the order" of defendant 2,000,000 feet of lumber per year. This amount might under certain conditions be reduced to 750,000 feet, or increased to 3,000,000 feet. In sawing said logs he was to produce the largest percentage practicable of clear lumber and the smallest percentage of refuse lumber. The lumber was to be tallied as sawed at the mill by a person to be selected by both parties.

Morrill was to be paid for sawing this lumber $8 per thousand, $4 when the lumber so cut was delivered and measured at the yards of defendant in San Jose or Alameda, and the balance of $4 fifteen days after the first payment.

Other conditions were imposed upon the respective parties, but these above stated are the ones specially brought in question by this controversy.

The plaintiff proceeded under this contract to make roads, fell trees, cut logs, etc., and the defendant through its proper officers and agents gave him necessary orders, some written and others verbal, but mostly written, as to the quality, dimensions and character of the lumber it required.

Upon the receipt of such orders the plaintiff proceeded to haul to his mill, place upon his carriages, and to saw such logs as were best adapted to the filling of the orders so received. In so doing it generally occurred that no one log could be wholly or principally cut into the character and dimensions of the lumber ordered without very great waste, and in most instances it was impossible to cut the larger part of one log into the character and quality of any lumber ordered. In such cases the plaintiff, after making from such log as much lumber as the same would supply of the special character ordered, would cut the residue of the log into such lumber, by dimensions and otherwise, as it would most economically and advantageously make, and as was best adapted to the general market; and would pile away in the yard the lumber thus made which was not included in the special order under which the same was sawed. Such lumber thus made was by plaintiff, so far as the same could be made available, applied upon such subsequent orders as came from defendant, and in this manner most of the lumber thus made by plaintiff in thus utilizing these logs was sent to and accepted by defendant as filling orders made by it subsequent to the sawing of such logs.

Under the terms of this contract, and upon specific orders of the defendant, there was supplied to it by plaintiff at said mill and yard 1,217,285 feet of lumber, all of which was accepted by defendant, and by it fully paid for.

Besides this lumber so ordered, or accepted, there was sawed by plaintiff in the economical and workmanlike cutting and disposition of said logs 213,000 feet of lumber well adapted to the general market, but which was not cut under any special order of defendant calling for that particular kind or character of lumber.

This lumber the plaintiff in due time requested defendant to accept and remove, and demanded payment for sawing the same, but defendant ever since has and still does refuse to measure, estimate, tally, remove or pay for the same.

The foregoing summarizes substantially the facts out of which the present controversy has arisen, the defendants insisting that by the terms of the written agreement they were required to accept and pay for only such lumber as plaintiff should cut under precedent orders from it; the plaintiff insisting that he was not to waste half or more of the logs once under the saw, but that it was his duty to use and utilize the whole of the log, even though there was no special order for portions of the logs thus cut.

The proposition thus presented is not free from difficulty. In the contract reference is made in four several places to the character of the work to be performed by plaintiff in cutting lumber, and in every instance the words "to order" are industriously repeated.

For the plaintiff it is argued, and justly, that to give these words the construction contended for by defendant was to require the plaintiff to waste from one to three-fourths of all the logs, besides a similar percentage of the labor expended in handling them, and that unless the plaintiff could pursue the course here taken, and utilize to the best advantage a log when once placed upon the mill carriage, he would have had to throw off half saw-logs and relieve himself from their burdensome accumulation by burning them.

Defendant concedes this, and answers that the logs were not plaintiff's, that this loss would fall upon defendants, and that, let the consequences be what they may, it has seen fit to so provide in its contract, and that it had a right to stipulate as it might see fit. That if plaintiff's construction is to obtain, though the defendant might require only a given character and quantity of lumber, and ordered with special reference to such requirement, yet the plaintiff in filling such order would cut ten times what was required and of a character which defendant had not ordered, could not use, and was not prepared to either receive or pay for. These are certainly the logical consequences following from either of the constructions contended for.

Upon the one hand plaintiff is compelled to waste more lumber than he utilizes. Upon the other, defendant must receive and pay for cutting lumber it has not ordered and does not want. Which of these constructions shall this contract receive?

The Code of this State has epitomized many of the rules of construction established by the decisions. It declares that: "The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity." (Sec. 1638, Civil Code.)

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect if it can be done without violating the intention of the parties." (Ibid, 1643.)

"A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Ibid, 1647.)

See also Thompson vs. McKay, 41 Cal., 221; Reedy vs. Smith, 42 Cal., 245.

Apply these principles to the facts and circumstances of the present case. Give this contract such a construction as shall "make it reasonable," as shall "not involve an absurdity."

Morrill, the plaintiff, an experienced mill-man, well knowing the conditions which inevitably attend the sawing of logs into lumber. The defendant, a corporation, dealing through skilled and intelligent agents. Is it reasonable that Morrill, thus informed, would have contracted, understanding that he might be required to handle and saw twice as much lumber as he was to be paid for? That the defendant intentionally agreed that Morrill might be compelled to waste, or justified in wasting, twice as much valuable lumber as he was to utilize, and that without redress upon its part? In short, that the words "to order," as here employed, were deliberately intended by both these parties as the abrogation of prudence, economy, self-interest and common sense? To be sure, parties may so bind themselves that there can be no mistaking their purpose, and then they have simply to abide the consequences, but that these parties deliberately contemplated and contracted for the consequences now insisted upon by the defendant is incredible. Had they so understood they must also have foreseen that such an arrangement would require the most unequivocal expressions for its maintenance, and should have fortified this most unreasonable provision with such apt phraseology as would have left no room for question.

Test this question by transposing these parties. Let Morrill have sawn just as ordered, and have tumbled off the logs, and burned three-fourths of these logs, as defendants *now* say he might have done. Try such conduct by a suit for waste. Morrill answers that under this contract, to order 100 feet of lumber authorized the destruction of 3,000 feet necessarily brought to the saw in producing it. No Court but would say such a course was outrageous, and certainly would scrutinize with no favoring eye the contract brought to excuse it.

Again, it appeared from evidence outside this contract that Reed was to receive $3.00 per thousand stumpage for these logs from the mill company, and this I understand was to be paid upon the logs as tallied at the mill.

If this was so, while Reed might consent that the logs, for which he had been paid, might be thus wasted, the defendant, who had been required to pay for the logs thus lost, would stand in a very different position. If, upon the other hand, Reed's stumpage was to be estimated upon the lumber which Morrill should saw "to order," and that alone, we have Mr. Reed in the attitude of deliberately contracting for the loss to himself of two-thirds the value of these logs. In either view of the case, a course utterly unreasonable and improbable. To repeat, it is utterly incredible that Morrill, an experienced sawyer, would deliberately and intentionally agree that defendants might compel him to waste and lose two-thirds of the labor he was expending in preparing and hauling these logs. Unreasonable that the defendant should have empowered Morrill to waste two-thirds of the logs for which they paid Reed, or that Reed should have knowingly consented to a contract by which two-thirds of the value of the timber he owned should be lost to himself.

Read this contract as defendant now insists it shall be construed, let these consequences be clearly and unequivocally set forth, and it is impossible to believe that either of these parties, thus understanding, would have signed it.

It is further insisted, "that as by the terms of this contract plaintiff was to be paid only for the lumber sawed as the same was tallied at the mill, or at defendant's yard, it cannot be required to pay until this is done." The very sufficient answer to this is that plaintiff had nothing to do with hauling the lumber from the mill. That was matter for the defendant alone, and as to tallying at the mill, plaintiff did notify the defendant that this lumber was cut at the mill and requested him to remove it and pay for it, both of which defendant refused to do. The failure of the defendant to discharge the duty imposed upon it did not in any way impair or impede plaintiff's right to proceed and enforce his right under the contract. That defendant was to pay when it had tallied and removed did not enable it to avoid payment by refusing to tally or to remove. It had a reasonable time in which to perform, but it could not release itself from its obligations by refusal or neglect to perform upon its own part.

As to the amount of lumber on hand, the result of thus sawing, the evidence is not as clear or as intelligible as could be desired. This is in part owing to the fact that the computation is the result of an estimate rather than by an exact measurement—that the lumber was of varying lengths and dimensions, and further, that the memorandum thus taken was lost, and those who made it were compelled to speak from recollection. Further than this, a considerable portion of the lumber was taken from the mill yard and floated in a flume to another place of deposit of defendant, and the fact as to what was removed, or when it was removed, is left somewhat obscure. From the best light afforded, I am of opinion that at the termination of this contract there was on hand at yard and flume 213,000 feet; that of this amount the defendant afterward received and paid for 30,000 feet, leaving on hand, and not paid for, 183,000 feet, for which the contract price of sawing was $1,466.

For this amount plaintiff is entitled to judgment. Counsel for plaintiff will prepare and submit findings accordingly.

CHAPTER XIX.

MILES vs. CITY OF SAN JOSE.

DECISION RENDERED JULY, 1886.

THIS is an action, apparently amicable, brought for the purpose of testing the right of the authorities of San Jose to pay the expenses of watering the public streets of the city from the general revenues of the city.

Before entering upon an examination of the City Charter, the rules will be considered by which such charters are construed and municipal action governed. Said Chief Justice Marshall: "As to all bodies which have only a legal existence, the Act of Incorporation is to them an enabling Act. It gives them all the power they possess, and when it prescribes a mode of procedure they must pursue that mode or their proceedings will be void." (Head vs. Providence Ins. Co., 2 Cranch, 156.)

Cases have been tried which are in accord with the general principle which holds municipal officers within the strict limits of the Charter as to official action, and measures their power by the methods which such Charter prescribes. In the light of these decisions I shall now examine the sections of the Charter which must dispose of the question in hand.

Section 9 is a comprehensive grant in general terms of about all the powers required to be exercised for the government of a city. With very many other enumerated powers are given the following relating to streets: "To lay out, alter, open, vacate, improve, cleanse, water and repair streets and sidewalks." In this section and in the paragraph above quoted, it is contended, the right to water the streets at the general expense is to be found.

By Section 24 of the Charter it is provided: "If at any time the owners of three-fifths or more of the real estate fronting on any street, counting from one cross-street to another cross-street, within the corporate limits of the City of San Jose, shall petition the Mayor and Common Council of said city for the sprinkling or watering of such streets between the points so designated, the Mayor and Common Council may by ordinance direct that said streets be sprinkled and watered, and the Commissioner of Streets shall thereupon proceed to advertise for proposals to perform said work in such manner as in said ordinance provided, and let a contract, subject to the approval of the Mayor and Common Council, to the lowest responsible bidder to water and sprinkle such streets between the points designated at such times and to such extent as in such ordinance provided," the costs of such sprinkling to be assessed and collected in accordance with the provisions of Section 19 of the Charter.

Under Section 19 thus referred to the cost of improving streets and sidewalks is made a special charge upon adjacent owners and is to be collected from them. That any watering, performed under Section 24, must be upon petition and at the charge of the adjacent owners cannot be questioned. For the defendant, however, it is insisted that the power to sprinkle all the streets at the public charge is given by Section 9, and that Section 24 but confers upon the citizens of a given locality the right to compel the sprinkling in such locality, whether the authorities so propose or not; while for the plaintiff it is insisted that Sections 9 and 24 are to be construed together as intended for one single purpose, Section 9 giving the general power, Section 24 the manner in which it is to be invoked, the method by which it is set in motion. A careful examination of the Charter satisfies me that the latter is the better construction, in fact the only one attainable.

For this conclusion many reasons may be suggested. There are two other sections which deal with cognate matters. Section 17, which provides for sewering, grading, etc., streets, recites that the same may be done upon the petition of the owners of three-fifths or more of the real estate fronting on such street, or if no such petition "shall be presented, and the Mayor and Common Council shall deem it for the best interest of the city, they may proceed," etc.

The same language is used in Section 31 as to the improvement of the channels of streams. The Mayor and Common Council may proceed upon the petition of two-thirds of the owners, or if they deem the public interest so require, may proceed without any petition.

In Section 24, providing for watering the streets, no such provision is made for the independent action of the authorities. They act only when they are acted on by a precedent petition.

As all these matters are included in Section 9, this distinction in the subsequent sections as to mode and procedure is significant. As to streets, sewers and rivers, the authorities can deal with them without any petition, upon their own conclusion as to the public necessity; as to watering the streets no such power is given.

* * * * * *

It is further argued that under the power to *repair* found in Section 9, and which also is imposed upon the city as to accepted streets, the right to water may be exercised, the argument being that as watering tends to preserve the streets, that may be exercised as a mode of repairing. The same reasoning would apply with equal or greater force to the macadamizing or paving of the streets. Farther, as already stated, the Charter, in Section 24, has dealt with the question of watering, not as a mode of repairing to be employed by the city, but as a special practice conducive to comfort or convenience to be employed by the citizen.

An earnest argument is pressed by counsel upon the Court to consider the present condition of the streets and the probable consequences of a construction adverse to the defendants. The individual who is called upon to determine this question cannot be insensible or indifferent to these consequences; the Court, in the discharge of judicial duty, cannot consider them. The exigency of the present may well call for legislative action—it cannot, by any proper or safe rule of procedure, control judicial construction. The rights of a city or of a single citizen must be measured by the same standard, must be judged by the same rule. Under the construction here contended for by defendants every limitation and restriction of the Charter would be swept away, and while the presented inconvenience might be palliated or averted, consequences more serious, far-reaching and pernicious might be inaugurated.

Other questions involving the financial position of the city were discussed by counsel. As the views here presented dispose fully of the questions now in hand, I deem it inadvisable to pass upon anything further.

Injunction as prayed for.

TRAVIS vs. CITY OF SAN JOSE.

DECISION RENDERED JULY, 1886.

From March 17, 1874, to the present time the City of San Jose has been a regularly incorporated city, so created by special Act of the Legislature of the State.

Upon the 19th of June, 1882, the City of San Jose, by ordinance on that day passed and approved, authorized Jacob Rich to lay through and over certain streets of said city a railway track, for the purpose of transporting passengers for hire.

Among other streets which he was authorized to so employ was Willow Street.

Upon the 5th of March, 1883, Rich entered into a written contract with one John Craven, by the terms of which Craven was to excavate for and lay said track and level said street, and fully complete said work within twenty days from the date of said contract. For this he was to be paid by Rich thirteen cents per foot.

It was further provided that Craven should pay one O. Halarden as superintendent of such work $3 per day, and further, that "Rich reserved the right to have the laborers employed upon the work paid for their services at the office of Montgomery & Wright, so that the first party sees that each and every man is paid."

Craven entered upon said work before the signing of this contract, but the same was drawn and signed before the 8th of March. Halarden acted as superintendent and was paid by Craven as agreed upon. The laborers were paid at Montgomery & Wright's.

While the work was in progress, laborers applying to Rich for employment were by him referred to Craven, but he neither directed nor requested Craven to employ them. Rich exercised no other or farther control over the work or over Craven than is indicated by the terms of the contract and the acts above recited.

Upon the 10th of March, 1884, Craven was prosecuting this work upon Willow Street. At the close of that day's work he had plowed a number of furrows through the street and had removed much of the earth so loosened with horse scrapers. The excavation thus left was about six feet wide and from five to seven inches deep. The earth excavated was thrown upon the south side of the excavation, and formed a mound from ten to fifteen inches high.

Neither barriers, lights, nor any other means were used to warn travellers of the condition of this street.

Before daylight upon the morning of March 11th, the plaintiff was being driven over this street. Neither plaintiff nor the person driving her was aware of the condition of the street.

The vehicle was driven upon the bank of earth made by this excavation, was overturned, and plaintiff was injured.

Upon the trial, at the close of plaintiff's testimony, motion for non-suit was made upon behalf of both defendants. Upon the part of the city, upon the ground that it could not be held liable for the negligence of its officials. Upon the part of Rich, upon the ground that Craven, as contractor, was in the exclusive charge of this work, as an independent employment and not under the control or direction of Rich.

For the more convenient and complete disposition of the case, the Court, *pro forma*, denied both motions.

For the same reasons it refused certain instructions asked by defendants. To all these rulings exceptions were duly reserved by both defendants.

The verdict of the jury determined all the controverted propositions of fact in favor of plaintiff. It decided that there was negligence upon the part of whoever was in charge of this work; that there was no contributory negligence upon the part of the plaintiff; and that as between Rich and Craven, the former was in such control of this work as made him responsible for the care with which it was conducted. It also found the plaintiff's damages.

This verdict now leaves to the Court as questions of law:

1. Can the City of San Jose be held civilly responsible for the negligent performance of a work of this character?

2. Is the verdict finding that Rich was in control of this work supported by the evidence?

That a municipality could not be held answerable at common law in actions of this nature is well settled. (2 Dillion, Municipal Corporation, Sec. 1,000; Cooley on Torts, 622; Hull vs. City of Boston, 122 Mass., 345.)

The reasons given for this immunity are not uniform nor always reconcilable. The more generally accepted doctrine seems to be founded on their relation to the superior political power. As the sovereign cannot be sued in his own courts as a matter of right, but only as a concession of grace, so these inferior political organizations, created by the State for more convenient governmental purposes, and charged by it with certain governmental duties, partake of the immunity of the sovereign creating them, and acting upon this assumption, many of the cases distinguish between those acts which are the performance of a duty imposed for the general good and those in which the municipality is subserving some special purpose in its own interest. (Murtough vs. St. Louis, 44 Mo., 479; Hart vs. Bridgeport, 13 Blatch, 80; Richmond vs. Long, 17 Gratt. 75; Mead vs. New Haven, 40 Conn., 72; Hamm vs. Mayor, etc., 5 Iowa, 458).

And in those States in which legislation permits these actions a very strict rule of construction is applied in determining what is thus permitted. So "when the statute gave in terms an action against towns for injury to person or property resulting from defective roads, held that this did not authorize a party to maintain an action for injuries to his wife or infant daughter." (Childs vs. Canton, 17 Conn., 477; Reed vs. Belfast, 20 Maine, 246; Bartlett vs. Crogan, 17 Johnson, 439.)

These are but a few of the many cases called to my attention. They are cited, not as controlling or necessary to the determination of this case, but for the purpose of showing that the rule, which I understand to be well established in this State, is neither peculiar nor exceptional. The decisions of our own Supreme Court will now be considered.

A party contracted with the city to construct a sewer. Through his negligence a person was injured. Held that the city could not be made liable. (James vs. San Francisco, 6 Cal., 523.)

The identical proposition was again presented in the two cases of Hale vs. Sacramento, 48 Cal., 214, and Krause vs. Sacramento, 48 Cal., 222.

"Without further discussing the question," said the Court, "the rule of non-liability is not a new one in this Court. It was so held in James vs. San Francisco, 6 Cal., 528. The rule ought not to be disturbed except for the most cogent reasons, and we are not satisfied that the better reasons sustain the opposite rule."

And as to the counties: "A county is a political subdivision of the State, and as such cannot be made liable for the negligent acts of its officials in not keeping the public roads in repair." (Hoffman vs. San Joaquin County, 21 Cal., 426; Crowell vs. Sonoma County, 25 Cal., 313.)

This rule as to counties was repeated in other cases not reported.

In 1872 the direct question was again presented as to the liability of a city. Said the Court: "Incorporated cities in this State are mere governmental instruments, formed under the State laws for the purposes of internal administration. They are not distinguishable from counties created by law for the same purpose. * * It was here held in Hoffman vs. San Joaquin County, 21 Cal., and Crowell vs. Sonoma County, 25 Cal., that counties were not liable for injuries sustained by private individuals through the neglect of officers charged with the duty of keeping public highways in repair. We think the same principle is applicable to and decisive of this case." (Winbigler vs. City of Los Angeles, 45 Cal., 34.)

This language cannot be mistaken nor its conclusiveness questioned. It cites with approval the doctrine that counties are not to be held responsible, and then, in terms as terse as emphatic, declares that the same rule, for the same reason, applies to incorporated cities.

Upon the argument counsel conceded the force of this decision, but insisted that the attention of the Supreme Court was not called to the language of the Charter imposing the duty to repair; and, further, that there was an essential difference between the Charters of Los Angeles and of San Jose.

If this were the fact as to the Los Angeles case, it certainly was not in a subsequent case in which the same proposition was again presented. In Tranti vs. City of Sacramento, 61 Cal., 271, plaintiff sued the city for injuries sustained from a defective sidewalk. A demurrer upon the part of the city was sustained, and plaintiff appealed. A very full summary of the brief of plaintiff's counsel appears in the report. Combating the Los Angeles decision he says: "We cite in support of our position the decisions of twenty-three States and of the Supreme Court of the

United States." And farther endeavoring to distinguish this case from the Los Angeles case, and presenting the identical argument here presented by counsel, he continues: "This case is clearly distinguishable from Winbigler vs. Los Angeles in this: Los Angeles incorporated under a general statute. Sacramento incorporated under a special statute. Los Angeles Charter reads: 'City Council shall have power to cause the streets to be cleaned and repaired.' Sacramento Charter reads: 'The same (*i. e.*, the streets) shall be kept in repair at the expense of the city.'"

To this argument, and this alleged distinction, the Supreme Court responded in terms which plainly indicated that they did not deem the matter open for further discussion. The entire opinion is here given:

"We do not think this case is distinguishable in principle from Winbigler vs. Los Angeles, 45 Cal., 36, and on the authority of that case the judgment in this case must be affirmed."

The attention of the Court could not have been more pointedly called to the distinction here contended for. A more concise and conclusive denial of such distinction could not have been worded. *

The language of the San Jose Charter is this: "Shall have power to lay out, alter, open, vacate, improve, cleanse, water and repair streets and sidewalks." * * (Sec. 9, City Charter.)

By the Sacramento Charter it was made the duty of the city to repair. By that of San Jose the city is simply empowered to repair. The assumed liability of the City of San Jose is certainly not strengthened by a comparison of the two charters.

These decisions of our own Supreme Court are too clear to be misunderstood. They mean nothing if they do not determine that the city is not responsible for acts of this character.

The defendant Rich occupies a very different position. For him as an individual there is no such immunity as attaches to the political body for the acts of its officials. It is insisted, however, that it was not his act but that of Craven, the contractor, which caused the dangerous condition of this street; that the negligence was Craven's and that he alone is responsible for it.

The principles that are decisive of this question underwent the most elaborate and exhaustive examination in Boswell vs. Laird, 8 Cal., 469. The clearness with which the rule is there stated, the frequency and commendation with which the case is cited, not only in our own Court, but in the Courts of other States, and by text writers, justly rank this decision as a leading case in the jurisprudence of the nation.

Said the Court, speaking by Justice Field: "The relation between the parties to which responsibility attaches to one for the acts of another must be that of superior and subordinate, and in which the latter is subject to the control of the former. The responsibility is placed where the power exists. * * The relation here shown wants one of the most essential features of the relation between master and servant. Something more than the mere right of selection on the part of the principal is essential to that relation. That right must be accompanied with the power of subsequent control in the execution of the work contracted for."

This case is cited with approval in our own Supreme Court in the cases of Farjoy vs. Seals, 29 Cal., 243; Duprat vs. Lick, 38 Cal., 691; Baker vs. Kensey, 38 Cal., 635, and the principle was reasserted in Bennett vs. Truebody, 5 West Coast Rep., 876.

Applying the principles of Boswell vs. Laird to the case at bar, and how can Rich be held responsible for this omission of Craven to properly guard this excavation? The two were dealing under a written contract which prescribed in terms precisely what each was to do, and gave Rich no more control over Craven as to the men employed, the appliances used, or the methods pursued than had they been total strangers.

Test this question by an effort, upon the most palpable grounds, on the part of Rich to interfere with Craven's work. Assume that Craven was proceeding in the most reckless manner, with the most dangerous appliances. Can it be contended that Rich could have interfered and changed these methods, or arrested the progress of the work, or have removed Craven, or rescinded or, as against him, modified in the slightest this contract? It cannot be pretended that he could, or that any Court could have sustained him in attempting it, and we have the case of a party held accountable for a negligent omission which he did not cause, could not have anticipated, and was powerless to prevent.

It is, however, insisted that this excavation in a street was of itself dangerous, and that this fact charges the party in whose interest it was being made with its consequences. I do not agree with counsel that this class of work comes within such a rule. Negligence may be predicated of any work in which human agency intervenes. It was not negligence to excavate this street. The negligence and the danger were the fact and the result of omitting lights and barriers. This was the omission of Craven as much as if one of his teamsters had left a pile of stone or an empty cart or a scraper in the road, or as though one of the men in his employ had carelessly driven against a passing vehicle.

It is further insisted that the fact that Rich named the superintendent whom Craven was to pay was such a control as made him the principal and Craven the subordinate. The same contention was made in Kelly vs. Mayor of New York City, 1st Kernan, 432, and Blake vs. Ferris, 1st Selden.

In both these cases the work was to be performed under the direction and supervision of certain city officials. It was insisted that this supervision made the city liable. The Supreme Court denied the proposition, and held this fact did not create, as between the city and the contractor, the relation of superior and servant. Both these cases are cited with approbation in Boswell vs. Laird, *supra*.

It is further insisted, both as against the city and Rich, that the duty which is owed to the citizen of maintaining the public streets in a safe condition cannot be avoided by the intervention of a contractor. In fact, that as to public streets, the rule of *Respondeat Superior* does not apply. This argument was urged upon the Supreme Court in the cases of James vs. San Francisco, 6 Cal.; Hale vs. Sacramento, 48 Cal., 212; Krause vs. Sacramento, 48 Cal., 222, above cited, and the distinction contended for was denied.

I deem it unnecessary to pursue this discussion further. I understood at the trial, as I am now assured, that every question now presented had been authoritatively decided by our own Supreme Court. The fact that these points have been earnestly and elaborately argued and these decisions confidently questioned, and the further fact that the propositions here involved are of frequent recurrence—these considerations, rather than any inherent difficulties in the case, have induced this extended examination.

In the case of the City of San Jose, the non-suit should have been granted.

As to the defendant Rich, the verdict which finds that he was in control of this work, and that it was his negligence which caused the accident, is not supported by the evidence.

As to both the defendants, the verdict is set aside and a new trial ordered.

JACOBI vs. DAWSON & CO.

DECISION RENDERED OCTOBER, 1886.

This action is brought by plaintiff to recover from defendants the purchase price of 1,000 boxes of Bartlett pears, sold by Scatena & Co., of San Francisco, the assignors of plaintiff, to defendants, in the month of August, 1886.

The defendants admit the contract for and delivery of the pears, but assert that of the 1,000 boxes so delivered 256 boxes were of so inferior a character, from size, worminess, or over-ripeness, as to be wholly valueless; that they seasonably informed plaintiff of that fact, and that they always have tendered and still do tender plaintiff the purchase price of the fruit which was of the character and condition agreed upon.

The only question made is as to the actual character and condition of these pears when shipped from San Francisco. All parties agree to what it should have been. The contract was for first-class pears; the business in which they were to be employed demanded that they should be green and hard when shipped, and that they should ripen during a period of from three to ten days at the factory.

Plaintiff's witnesses testify that the fruit was of this character and condition; the defendants' that it was not.

For the plaintiff were examined Scatena, Stroud and Dillon. Scatena and Dillon testify that these pears were all first quality and green and hard. Stroud, that he shipped two of the five lots, and that those which he thus furnished were good and hard. The testimony of this last named witness does not necessarily conflict with that of defendants, as he furnished but a portion of these pears, and those in such lots as makes it difficult to clearly identify them—at all events, a party might very easily be misled as to the Stroud shipments. As to Scatena and Dillon, a direct conflict is presented between their testimony and that of defendants.

Upon the part of the latter, five witnesses testify as to this fruit. Dawson, the defendant; Mills, the inspector of fruit at the factory; Bell, who assorted and classified the fruit; Van Eaton, whose business was to receive and open the boxes of fruit; and Holman, the truckman, who hauled it from depot to factory; each and all of these testify with the utmost positiveness that the fruit was small, wormy, and much of it over-ripe when received and unfit for use. According to these witnesses, much more than 256 boxes were wholly unfit for the defendants' business. Holman testifies that when he hauled one lot from the depot the juice of the pears was running from the boxes, and that defendants' inspector refused at first to permit them to be unloaded. The conduct and course of Dawson at the immediate time strongly corroborate these statements. He wrote a letter addressed to Scatena, and which appears in its regular sequence in the factory copy-book, in which he describes this as the condition of the fruit, and declares that he will not pay for it, nor will he accept any more of this character. He returns to Scatena two boxes as evidence of the condition of which he complains. Both in the number of witnesses who testify and in the positions which they occupied, not only enabling them but requiring them to note accurately, and in the other attendant circumstances, I find strong corroboration of the defendants' position.

The tender was for all that defendants could be justly called upon to pay.

Plaintiff will take judgment for the sum of $1,168.20, less the defendants' cost of this suit, and the tender made by defendants, and now in Court, will be paid to plaintiff, less these costs of defendants.

PARKER vs. LARSEN.

DECISION RENDERED DECEMBER, 1886.

This case shows the defendant irrigating from artesian wells a field of alfalfa—and permitting the water so employed to accumulate and remain in a ditch upon his own land, but so near the land of plaintiff that this water percolating through the embankment of the ditch, and also through the natural soil, so saturates some three acres of plaintiff's land as to make the same wholly valueless for any purpose of ordinary husbandry. For the plaintiff it is insisted that the rule *Sic utere*, etc., inhibits this impairment by defendant of his neighbor's property, while for the defendant it is urged:

First.—That although defendant might not be allowed to flood his neighbor's land by a flowing stream, yet that a different rule obtains as to percolations, and that for the consequences of these he is not responsible.

Second.—That the Court will take notice of the climatic condition of the country. That irrigation is a right recognized upon this coast, and that this as a necessity gives to the defendant the right to irrigate to the full extent of his own requirements, and that the consequences, however disastrous, that may result to another are *Damnum absque injuria*, and without legal redress.

There is perhaps no precept known to the law which comprises a more extensive field of judicial inquiry than that which is embodied in the maxim, *Sic utere tuo, us alienum non leadas.* "So use your own, that you injure not another." Whenever, by the act of one, another has been injured this maxim is invoked, and the controversies by which it has been illustrated, and in which it has been applied, are as extensive and as varied as the range of human actions. Upon principle it is difficult to see how this maxim can be recognized, and the defendant suffered to destroy his neighbor's property that he may improve his own. An examination of the cases shows the position equally untenable upon authority.

The position contended for by defendant, that interference with percolating water is the same as injury from percolating water, is not sound. And the cases which distinguish between water which saturates the soil, but without any perceptible flow or defined channel, apply to a very different condition from that here presented. The cases in which this distinction is recognized are those in which a person improving his own land has intercepted or withdrawn the water saturating the soil or percolating through it, and another has suffered injury from this diversion. In such cases the water is held to be part of the soil which it thus saturates, and the owner may deal with it as he deals with the soil itself, a distinction being recognized in most of the cases between such waters and those which have united in streams and flow through traceable channels, subterranean or surface. The case at bar is in no way analogous to these. Here the plaintiff complains that waters artificially brought to the place have been so applied as to spoil his land.

This distinction was fully recognized in Pixley vs. Clark, 35 N.Y., 520, which will be further considered. But beyond this right of a man to, by artificial appliances, improve his own land to the detriment of another a party will not be permitted to even relieve himself of natural disadvantages where this results.

Every man is assumed to possess land charged with such unequal conditions as natural laws have impressed upon it, nor will he be suffered to transfer the detrimental conditions of his possession to his more fortunate neighbor. So it is held that the owner of a swamp cannot so accumulate the natural waters as to relieve himself by making of his neighbor's land a morass. (Miller vs. Lanbach, 47 Penn., 154; Butler vs. Peck, 16 Ohio, 334.)

In a Pennsylvania case, said the Court: "One has no right to cut away or drain natural reservoirs upon his own land, whereby he may reclaim the land occupied by the same, if thereby he causes more water to flow upon his neighbor's land. The reclamation of land is certainly for the advantage of the common weal, as well as of the persons owning it, but such reclamation is not allowed by the law at the expense of my neighbor. I have no right to make my property more valuable by making my neighbor's less valuable." (Kauffman vs. Greisner, 26 Penn., 407.)

This much as to the right of a party to relieve himself of water at the expense of another. Does the fact that these waters are thus carried under the surface, and by percolation, withdraw this case from the one above cited? In Cooper vs. Barber, 3 Taunt, 99, the plaintiff diverted the water of a natural stream through penstocks to irrigate his land. This water percolated beneath the surface, through the soil, and injured a party's cellar and kitchen. Held that he had a right to abate the structure as a nuisance, and that the party could acquire no right to thus use this water by prescription. In Pixley vs. Clark, 35 N. Y., before quoted, the precise question here involved was presented, and all the authorities were reviewed. Said the Court: "It matters not whether the damage is occasioned by the overflow of or the *percolation through* the natural banks, so long as the result is occasioned by an improper interference with the natural flow of the stream an action will lie." (Pixley vs. Clark, 35 N.Y., 520.)

Against this principle and these authorities, defendant presents the case of Gibson vs. Pritchta, 33 Cal., 316. In this case the defendant brought upon his land the water of a small ravine for the purpose of irrigating a crop of potatoes. The waters so used percolated through the soil and injured a mining tunnel of plaintiff, distant over 100 feet from defendant's land. Said the Court: "Plaintiff's right to recover depends upon the principles and rules of the common law applicable to cases between adjoining land-holders where the one complains that he has sustained an injury by the act of another, done upon his own land. * * * * In irrigating his land, the defendant is subject to the maxim, *Sic utere tuo*, and an action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiff. He is responsible to the plaintiffs only for the injuries caused by his negligence, or unskillfulness, or those willfully inflicted in the exercise of his right of irrigating his land."

This case, as reported, does not appear to have received very extended consideration.

Broom's Legal Maxims, 274, is the only authority cited for the rule announced.

What was necessarily decided may, perhaps, be reconciled with the maxim *Sic utere*, and with the general rule, but this is not, as I understand the cases, the rules or the principles of the common law as indicated in the English case of Cooper vs. Barber, or in the more noted case of Fletcher vs. Ryland, 1st Exc., 265.

In the latter case, water from the reservoirs of the defendant made its way through the soil into old workings and flooded a mine. The Court held: "That the true rule was that the person who for his own purposes brings on his lands and collects, and keeps there, anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not is *prima facie* answerable for all the damages which are the natural consequences of its escape. He can excuse himself by showing that the escape was owing to plaintiff's default, or as a consequence of the *vis major* or the act of God; but these are the only excuses that can be received."

This, says the author of the leading work upon this subject, "We think upon authority is established law, whether the things be beasts, or water, or filth or stenches." (Angell on Water Courses, Sec. 114.)

Defendant insists that the rule laid down in this case of Gibson vs. Pritchta authorizes the irrigator in the use of his own land to wholly destroy the value of his neighbor's. Were it clear that this case so decided, I should certainly follow it without regard to any personal opinion as to what the rule is, or should be. I am not satisfied that this case necessarily so determines, and decline to so construe it. It is further urged by counsel that the principle here involved is one of great importance, and far-reaching in its consequences; that carried to its logical results it may materially interfere with and prevent the important irrigation enterprises now proposed in this State. To this the answer must be that the Court cannot take into consideration the ulterior consequences to even the immediate parties, much less what may possibly follow from the future application of the same rule to others. A similar argument was urged before the Federal and State Courts in the *debris* cases, and the picture, not over-drawn, was there presented of an industry which had given a State to the Union, and untold millions to the wealth of the world—which had had constant recognition in both Federal and State legislation, in whose prosecution vast sums were invested and large communities vitally interested, and which must cease were this rule to be enforced, and thus absolute ruin brought upon entire communities. To these arguments, urged with all the force which eloquence and earnestness could command, there could be but one reply: That in the Courts the right of the many against the one were the same as those of the one against the many. That the maxim involved was the rule for all, and could have no partial application, and this vast industry with all its varied interests at the bidding *Sic utere tuo* ceased. (People vs. Gold Run Co., 66 Cal., 151.)

Nor does it follow that from any principle here applied the larger systems of irrigation which may be inaugurated will be either prevented or materially impeded. Causes and their consequences may be so widely separated, their connections so remote or obscure, that the law will not attempt to deduce legal liability from premises thus doubtful.

So if waters taken from their natural channels and distributed over the plains should by percolation mingle with the natural subterranean waters which permeate the strata of the earth, and such waters should rise and injury should result, how could the law distinguish between the natural and the artificial causes thus obscure and thus intermingled? If the Court did not have judicial knowledge, it would be instructed that such subterranean waters often have their source of supply in remote regions; that they respond but slowly to the changes of the seasons, but rise and fall in cycles of many years; that, in fact, in these subterranean waters is held "the gathered winter of a thousand years."

Similar considerations of remoteness and obscurity as precluding recovery were suggested by Lord Brougham in Acton vs. Blendell, 12 M. W., 134.

Nor does anything here decided determine that a party irrigating his own land is liable for that trifling increase of moisture which is communicated by the contact of damp earth. There may be from such causes some trifling change, perhaps detriment to the soil of a party, and such would probably fall within the rule *Damnum absque injuria.*

For the law is a practical science, and cannot take notice of melting lines, nice discriminations and evanescent quantities. (Jones on Bailment, S. 9.)

The case at bar falls within neither of these considerations. It is neither beyond nor beneath the purview of the Court. The cause set in motion by defendant and its consequences to plaintiff are apparent, positive and unmistakable. By it plaintiff has been deprived of the use of several acres of his land, in order that the defendant might utilize his own in a particular manner and to the very limit of his possessions.

For such an injury the ancient maxims of the law—the simplest principles of justice—give redress. Judgment is rendered for plaintiff in accordance with findings.

TAYLOR vs. FRULING.

DECISION RENDERED DECEMBER, 1886.

This action is brought by plaintiff, a dealer in newspapers and periodicals, to recover from the defendant $9.75, alleged to be due for the San Francisco *Call*, delivered by plaintiff to defendant between the 1st of January, 1884, and the 1st of April, 1885. The carrier of plaintiff testifies that he delivered this *Call* with other papers upon the line of defendant's residence from January, 1884, to April, 1885, and that he left every day a copy of the *Call* at defendant's residence; that it was so delivered by throwing it over the fence. It further appears that defendant's yard was largely grown up with shrubbery and flowers and that a dog was kept upon the place.

The defendant testified that the paper during this time was delivered very irregularly, and his daughter that it was not received at the house half the time. Many causes may have prevented the finding of many of the papers thrown into the yard by the boy. They may have been concealed in the shrubbery or carried off by the dog, or in other ways been prevented from coming to the notice of the defendant's family. It is, however, clearly established that during this period there were many copies of this paper left at defendant's residence and read by the family, and, further, that during the period for which plaintiff sues and during the former period of nine years in which plaintiff was supplying this paper no complaint was made by defendant as to any irregularity on the part of the carriers.

For the defendant it is now insisted: 1. That this is an entire contract upon the part of the plaintiff to deliver to defendant a copy of each and every consecutive issue of this paper, and that the failure so to do is a failure to perform, fatal to his right of recovery. 2. That if this be not so, and to the extent above stated, it is at least like any other contract for the sale and delivery of goods, and that plaintiff in no event can recover for copies not delivered.

In my opinion, this contract should not receive either of these constructions, but should be regarded as an agreement for continuing services performed by plaintiff for defendant, and in which reasonable diligence upon the party performing is the measure of duty. In this and kindred cases both parties must be taken to contract with knowledge of those conditions of which every citizen is fully apprised, of the exigencies which may attend the procuring of papers by the principal, and of the means and appliances by which they are to be distributed; that the carriers are usually boys, sometimes inefficient or careless; that changes in the carriers employed, or in the residence of the parties supplied, may often lead to mistakes and failures, and that these are possibilities absolutely inseparable from this business; that the fact that every customer is regularly and promptly supplied cannot be possibly known to the publisher, but must be to the customer, and that the only check that the supplier can have upon his agents, the only knowledge he can have of their mistakes or derelictions, is through the complaints or information of his patrons; that this case is like those of personal services rendered on continuing contracts, performed under the immediate view and supervision of the party benefiting by them. They may not come up to the full measure of efficiency contracted for, or he may find fault and complain while they are being rendered, but by permitting these imperfect services to continue he will be held to have waived the strict compliance upon which he might have insisted, and the fault-finding and chidings which attend most service-contracts will be taken as promptings to better performances and greater efficiency, and not as either a rescission of the contract or a disavowal of the service actually received.

In the present case the defendant, if dissatisfied with the performance of plaintiff's carriers, should have made that fact fact known to plaintiff, and if such notice did not bring about a correction, should have informed him that his contract was at an end. The acceptance without complaint of the copies that did come to hand was upon his part a waiver of his right to complain of the manner in which this continuing service had been before performed.

Judgment for plaintiff and against defendant for $9.75 and costs of suit.

CHAPTER XX.

PEOPLE vs. JOHN CLARK.

CHARGE TO JURY. DELIVERED DECEMBER, 1886.

GENTLEMEN OF THE JURY: The defendant, John Clark, is proceeded against by this information for the crime of murder, alleged to have been by him committed at the County of Santa Clara, upon the 6th day of November, 1886, in the felonious killing of one Owen Leggatt.

Murder is defined by our statute to be: the unlawful killing of a human being with malice aforethought. Such malice may be expressed or implied. It is expressed when there is manifested a deliberate intention to unlawfully take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willfull, deliberate and premeditated killing; or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery or burglary, or mayhem, is murder of the first degree, and all other kinds of murder are of the second degree.

Upon a trial for murder, the commission of the homicide of the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the prosecution tends to show that the crime committed amounts only to manslaughter, or that the defendant was justifiable or excusable.

In the present case it is not disputed that the deceased, Owen Leggatt, came to his death at the hands of the defendant, John Clark, but it is contended that the defendant was at the time of the homicide in such a disordered and infirm mental condition that he was insane and not accountable criminally for this action.

Penal laws are intended only for the punishment of reasoning beings, and a person may be so deficient in mental capacity, so disordered in intellect, that the law will hold him wholly irresponsible and unaccountable for any act of violence committed by him.

The jury will, however, bear carefully in mind that is not the mere fact of mental weakness or of the existence of insanity—partial or general—which will thus exonerate. That is to be determined by the measure of capacity which remains to the party. Not by an attempt at estimating what the party may have formerly possessed, but by the intelligence which he still possesses.

The law takes no note of the variable characteristics of men, or of the varying conditions or temperaments at different times of the same individual, in judging as to criminal responsibility, but for its own wise purposes it establishes one common rule, one standard of universal accountability, and by this all are alike gauged.

That standard is this: Had the party when committing the act sufficient mental capacity to appreciate the character and quality of the act? That is, did he know that by the course he was pursuing, the means he was employing, he was endangering or destroying the life of a fellow-creature; and did he intend this as a result?

Did he know and understand that this action upon his part was a violation of the rights of the party thus assailed, and in itself wrong? Did he know that it was prohibited by the laws of the land and that its commission might entail punishment and penalties upon himself? If he then had the capacity to thus appreciate the quality and nature of his act and to comprehend and estimate the possible consequences to himself, he is responsible to the law for the act thus committed, and is to be judged accordingly.

If, upon the other hand, from the violence of disease, from injuries, or from any other cause, he was mentally incapable of knowing or appreciating the character or quality of the act he was committing; did not know or comprehend that it was an invasion of another's rights, and in itself wrong; or was incapable of understanding that it was a violation of the law, which ought to entail upon himself punishment and penalties, such mental weakness is to be taken as the insanity which excuses, and the jury should acquit.

For the defendant it is urged that although he may not have been insane upon other or general subjects, or may by his acts, conduct, or declarations have shown that he comprehended the character as well as possible consequences of the act he was committing, yet that he was impelled thereto by an insane and irresistible impulse—that he was driven to an uncontrollable frenzy by the appearance or mention of the deceased, and it is insisted that if in the killing of Leggatt he was acting under such an impulse he is not to be held criminally responsible.

The doctrine of non-accountability for such asserted impulses is no new thing. It has long been a favorite speculation with scientists and metaphysical writers upon the phenomena of mind, and has even received an occasional recognition in some Courts, and will undoubtedly be presented and insisted upon so long as the insane, morbid, or immoral actions of men shall be the subject of judicial investigation. However interesting this enquiry may be, however painful its contemplation or important its application, to those who may indulge in these inquiries, or in those Courts which may recognize this rule, or whatever may be individual opinions as to its soundness, suffice it to say, that in this State, and in her Courts, this doctrine of "irresistible impulse" has neither place nor recognition.

Municipal law, which we are trying to administer, is a practical science. Its purposes, practical ends to be attained through practicable means, and these ends are reasonably attained when it acts upon facts and premises fairly ascertainable through the ordinary medium of proof; but in the effort to apply the rule here contended for how is the jury to determine that the impulse upon which the party is claimed to have been acting was or was not irresistible?

The processes through which such impulse works are purely mental, neither cognizable to the senses nor ascertainable through any ordinary methods of proof.

All that we can possibly know is that the man has not successfully resisted—that he has yielded to the temptation.

The force of the impulse, the vigor of the resistance, or even the effort to resist, we can neither estimate nor know.

We do know that certain passions are common to all.

The law attempts to restrain their exhibition within certain limits. Some resist, and successfully, and others yield. The force of the temptation and the measure of the resistance Omniscience alone can estimate To enter upon such an inquiry could but confuse and embarrass fallible men. Nor would the result be desirable were such investigation practicable. A man of violent and ungoverned passions, under the influence of a trifling provocation, kills his fellow. In another, whose disposition is more phlegmatic, or his temper better controlled, the same grievance hardly excites an emotion. Is the first to find immunity in thus yielding to his vicious impulses and the last to be punished for the same act? This result must follow if this doctrine of irresistible impulse is to be recognized by the Court. This the discrimination which must follow through the entire range of criminal actions.

Such a distinction breaks down all the barriers between virtue and vice—between those who obey and those who violate the law. The ascertainment of the premises upon which such a rule could be founded would be impossible. The consequences would be subversive of every rule of moral self-restraint and most disastrous.

It is farther urged upon behalf of defendant that the absence of any motive to explain this killing by defendant is in itself proof of insanity. That the absence of any motive, or the apparent insufficiency of any alleged motive, is to be considered a circumstance tending to indicate insanity is undoubtedly true; and were a case presented in which a party was shown to have intentionally slain an utter stranger—one with whom he had neither controversy nor acquaintance, when no resentment existed, and where neither gain, advantage, nor gratification could result to the slayer—such a killing, thus wanton and purposeless, so utterly wanting in motive, might well be regarded as the act of a person absolutely bereft of reason, or utterly depraved. The jury will, however, bear in mind the distinction between the entire absence of any motive and the existence of some actual inciting cause, though that be apparently a trivial and most insufficient one. And they will further bear in mind that from the varying temperament and disposition of men, circumstances which in one would hardly stir an emotion, might in another differently constituted excite to the most violent and criminal action. These are general principles, which need no further explanation for their comprehension and application.

I shall now call your attention to the testimony presented respectively upon the part of the prosecution and defense, and shall indicate the principal propositions for which it is offered. There is evidence before you tending to show that upon the 6th of November, 1886, the defendant met deceased upon a street of San Jose, and without any contest or controversy, fired a pistol shot into his back. That the deceased ran a short distance and fell. That the defendant attempted to fire at him while he was running, and that after he fell he approached him and fired three or more shots into his body. That when taken into custody he stated that deceased was a bad man, and that he had followed him from a point about one block distant, but had not shot him at the place where he first saw him for fear that he might hit some other person. These circumstances, if credited, are to be considered by the jury, not only as establishing the fact of the killing of defendant, but they will also estimate their force and value in judging whether a party making such preparation, following up with such persistence such an assault, and taking the precautions here indicated, did understand the nature and quality of the act he was committing and its consequences to the party assailed. There is testimony tending to show that after the shooting the defendant stated that this act would be for him "hanging or nothing." The jury will consider this statement, if credited, in judging whether the defendant had sufficient capacity to understand that his act was wrong, was a violation of law, and might entail upon himself punishment as a consequence. There is evidence tending to show that a little girl, an acquaintance of the defendant, was also an acquaintance of the deceased, and that defendant stated that deceased had alienated her affections or regards for him. Also that the father of the defendant had made certain business arrangements with deceased, which the latter had not carried out, to the financial detriment of the elder Clark, and that this fact was known by the defendant.

Also that the defendant had in a former affray with deceased wounded the latter with a knife.

Also that defendant had in the month of June, 1886, been examined touching his sanity before a commission for the purpose of placing him in an insane asylum, and that upon this examination the deceased had been examined as a witness, and had testified to defendant's mental unsoundness, and defendant had, as a result of such examination, been committed to an insane asylum, and that defendant knew that deceased had so testified.

The jury will judge whether these circumstances were proven, and if credited, whether from any or all a motive of jealousy, resentment, or revenge may not have been created in the mind of defendant toward the deceased.

It is further in proof that in the month of June, 1886, the defendant was upon an examination, duly had, adjudged insane, and committed to the insane asylum, that he was there taken, and that he had not been formally discharged at the time of the homicide. I instruct you that the fact that the defendant was so adjudged insane is no more than a circumstance showing his mental condition at that time; that the judgment, or order, of the commission in no way fixes the extent of his mental capacity, nor establishes his non-accountability for crime; that as a judgment it is conclusive authority for his detention and treatment in the asylum, and for nothing more. And the jury are instructed that a man may be in such a disordered mental condition as to fully justify his commitment to and detention in the State Insane Asylum, and still possess such mental capacity as to make him as fully responsible to the criminal law for his acts of violence as though his mental condition had never been in any way called in question; that the rule I have heretofore indicated as to the degree of mental capacity which will render a person criminally responsible is to receive the same application as to persons within, as to those without, insane asylums.

There is testimony before you as to the former character and disposition of the defendant, and showing that as a boy he was of a quiet, peaceable and amiable disposition. This testimony was not introduced for nor is it to be considered as to the fact of the killing of Leggatt by defendant—as to that there is no dispute; nor as tending to show who was the aggressor in a contest. That there was a contest there is no pretence. This evidence was admitted as tending to show the changed mental condition of the defendant, and as tending to render it more or less improbable that a person of this former character and disposition would commit an act of the character here charged unless there had been a decided change of disposition and alteration of intellect.

Witnesses have testified before you as to the conduct of the defendant through a period of years as indicating sanity or insanity, and medical gentlemen have been interrogated as to their opinion of the mental condition of defendant, based upon hypothetical statements made to them. It is for the jury to judge of this testimony, its credibility, force and effect, and in so doing you will consider the witnesses and their capacity and opportunities for observing, the extent of their experience, the force of the reasons which they present, the candor, disinterestedness and ingenuousness of their replies, and from these and kindred considerations will judge of the credit and weight to be given to their testimony.

The jury are to bear carefully in mind that all this testimony as to the former or present condition of defendant are but circumstances to aid them in determining what was the mental condition and capacity of the defendant at the time of the homicide.

Upon the issue of insanity the burden of proof is upon the defendant. The law presumes him sane, and this presumption he must overcome.

This may be done by a mere preponderance of evidence, such as in a civil action would determine a controverted proposition of fact.

If, however, the jury shall be of opinion from the evidence that the defendant was at any time before the homicide insane, and that such insanity was not accidental or temporary in its character, it will be presumed that such insanity continued, and the burden of proof will be upon the prosecution to show by a preponderance of evidence that such insanity did not in fact continue, and that the party had become sane, or had been restored to such a condition as would make him criminally accountable.

The defense of insanity and the evidence by which it is sought to be established should be considered by the jury with caution and circumspection, and the testimony and facts by which it is supported scrutinized with care. This is a defense which may be, and sometimes is, resorted to in cases in which the proof as to overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this as a defense is to be weighed fairly, fully and justly, and when satisfactorily established must recommend itself to the sense of humanity and justice of the jury, still they are to examine it with care, lest an ingenious counterfeit of this mental infirmity should furnish immunity for crime.

As to all other matters than the defense of insanity the burden of proof is upon the prosecution. The law presumes the defendant innocent until his guilt be established beyond a reasonable doubt, and this presumption attaches at every stage of the case, to every fact essential to a conviction. Such a doubt, however, should be actual and substantial; not a mere shadowy possibility or fanciful conjecture.

Everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt; but by a reasonable doubt is meant that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Should such a doubt exist, either as to the whole case or any fact essential to a conviction, the defendant is entitled to the benefit of such doubt, and you should acquit. Within the information in this case is included murder in the first degree and murder in the second degree. Should you entertain a reasonable doubt as between the two grades of crime, you will give the defendant the benefit of such doubt and acquit of the higher offence.

Should the jury convict they will designate in their verdict the degree of the crime of which they convict.

Should they acquit, their verdict will be: We, the jury, find the defendant not guilty.

Should your verdict convict of murder in the first degree, it is your right to designate the penalty that shall be inflicted. That penalty is either death or imprisonment for life in the State Prison. In thus giving the jury the power of adjudging the penalty, the law assumes that offenses of the same general character may present different degrees of atrocity, and allows the jury to attach to the more heinous offence the higher penalty.

Should you find the defendant guilty of murder in the first degree, and should you not designate the penalty, that penalty is death.

In any verdict you may return all must agree.

You have been admonished at the several adjournments of the Court to avoid any expression or comparison of opinion, even with your fellows. That injunction is now reversed, and it becomes now your duty to have, with each other, the fullest and most thorough interchange of opinion.

That this may be had, and that the result desired, the ascertainment of the truth, may follow, a few suggestions as to the spirit which should characterize your deliberations may not be misplaced.

It sometimes happens that immediately upon retiring a juror expresses himself with emphasis and confidence as to his own conclusions, and perhaps avows his intention of adhering to the opinion thus expressed.

Such hasty expression is rarely productive of good; by it unnecessary antagonisms are created or a pride of self-opinion enlisted which may embarrass the juror in fairly appreciating the reasonings of his fellows or having his own received with proper consideration.

You are not to abandon any position or opinion you may honestly entertain for the mere purpose of agreeing with your fellows; neither are you to obstinately adhere to an opinion merely because you have once entertained or hastily expressed it. Restrain your too confident expressions. Hold your judgments in that condition of abeyance that the reasonings of your associates may be justly estimated and your own respectfully received and fairly considered, and remember that it is not by the opinions with which you retire, but the conclusion with which you return, the soundness of your judgment will be estimated.

BAPTIST CHURCH vs. BRANHAM.

DECISION RENDERED JANUARY, 1887.

This action is brought by plaintiff averring itself a religious corporation under the laws of the State, and possessed of a certain lot of land, church edifice and certain personal property used in its said church in the religious exercises of the persons worshipping therein. It further recites that certain individuals named have obtained in Department Two of this Court a judgment against certain other individuals named of restitution of this church property, and that in the enforcement of this judgment Branham, as Sheriff, is about to place these individuals in the possession of the property of this corporation plaintiff, to its irreparable injury. Whereupon it prays that said defendants be enjoined, etc. To this defendants demur, and assign as grounds of demurrer:

First.—That as plaintiff's bill recites a judgment regularly obtained, and therefore properly enforceable, it is not in the power of another department of the same Court to thus enjoin its own process.

Second.—That the judgment which plaintiff recites is conclusive as an adjudication of the rights of the parties now seeking to avoid it, and that they will not be permitted to in this manner call it in question.

Third.—That the exhibits made part of plaintiff's amended complaint show that it is not and never has been a corporation.

Demurrers try nothing but the legal sufficiency of allegations. In the present case the pleader in terms alleges that plaintiff is and since 1866 has been a corporation created under the laws of this State, and as such seized and possessed of the land and property detailed. This is sufficient to give plaintiff a legal status as a corporation before this Court. It is further objected that the Superior Court of this county is but one judicial organization, though organized in departments, and that it is not in the power of one of these departments to restrain or prohibit the execution of the judgments or orders of the other. In fact that it is the Court at the one time commanding and prohibiting the same act. The assertion of defendant's counsel that the two departments constitute but one Court is undoubtedly sound, but in that very fact is found the answer of defendant's argument. That Courts of co-ordinate jurisdiction do not attempt by injunction or otherwise to control each other's orders has often been asserted by our Supreme Court, and the cases are cited and the reasons stated in County vs. Davis, 37 Cal., 269. It is to prevent the unseemly and fruitless controversies which must follow from the efforts of judicial equals to control the judicial action of each other. It is therefore not that a Court may not control its own proceedings, enjoin or recall its own process, but that it may not attempt to exercise this high prerogative over another tribunal judicially its equal, that this rule is established.

In the present case the assertion of counsel that this is but one Court answers the argument and refutes the position assumed upon it. That it is but the one Court, one judicial organization, does not require the concession of counsel. It was so made by the Constitution, which created it, and created it one. Its organization into departments was the act of the Judges for the more convenient transaction of business. If the plaintiff was entitled to maintain this action anywhere, under the case above cited from 37 Cal. this was the only Court in which he could bring it, and in this Court it is brought. That it chances to fall to Department One was the result of an arithmetical ascertainment by the Clerk under a rule of the Court, and in no way the action or selection of the litigant itself. If plaintiff could maintain this action anywhere, he has selected the only form in which he can be heard. If any question of judicial comity or propriety is presented, that is easily disposed of by an order transferring it to the department in which a branch of the same controversy has been already considered. It is, however, insisted that the very controversy here set on foot was judicially disposed of by the former determination in Department Two, and that it is now *res judicata*, and concluded in this Court. If this be so it must be upon the ground of estoppel, and to this the conclusive answer is that plaintiff as a corporation was not a party to that proceeding, had no standing before and no day in the Court, and that estoppels of judgment are only between the identical parties and to the same subject matter. It was, however, suggested rather than urged that certain individuals now acting for this plaintiff were active in and had full notice of the former litigation that in some way affects this corporation. If this be so, it follows that a party must force himself into every litigation set on foot by third parties, and to which he may not have been invited, at the penalty of having the results of such litigation conclude his own rights. The statement of such a proposition is its own refutation. It is further insisted that Judge Spencer did in fact deal with and dispose of the very proposition here presented, and that these defendants should not be now harassed by a renewal of this controversy.

If I am right in the position heretofore assumed, this objection is already disposed of. To avoid any misconception of this former decision, and of the present position of this Court, this objection will be examined as an independent proposition. The case presented to Judge Spencer was that of a number of individuals, originally united as a religious association by community of faith, of feeling, and thus connected, acquiring certain temporalities as a means to the exercise and enjoyment of their particular religious tenets. It further presented this association as thereafter divided into two parties, each asserting the better right as against the other to control these corporations; one as being the numerical majority of this association; the other of asserting its conformity to the doctrines and faith of the original association and the non-conformity in essentials of the majority. These were the parties, and the only ones, then before the Court; these the foundations of their respective claims. There was no corporation to be considered, no pretense that any existed, and I am informed such corporate existence was then and by both parties expressly disclaimed. Upon the case thus made Judge Spencer had but to decide which of these conflicting parties was in conformity with the faith and the purposes of those who formed this original association and endowed it with these temporalities.

This case at bar presents a very different question. There is now before the Court an incorporation, one entity. In it individuals and their rights and powers are merged, and as effectually absorbed as though they had no existence. When the temporalities of such an organization are brought in question, they are determined, not by any inquiry as to identity in faith or conformity in practice, but by the ascertainment that a corporation exists and that those professing to represent it are in fact its trustees. Upon this determination the statute declares as to the right and interest such trustees have with the exclusive custody of the temporalities of the corporation. It is such an organization that here appears, asserts its legal existence, and insists that these rights, with which the law of the land invests it, shall not be wrested from it in a controversy in which it has no hearing. There is nothing in this view of the case which in any way conflicts with the decision of Judge Spencer. To that decision, both as to determination and exposition of law, I give my entire concurrence; nor would a final determination of this case in favor of the present plaintiff necessarily take it in any way without the principles or the reasoning of Judge Spencer's decision. I do not understand that it is in the power of a majority of the members of a religious association, whether incorporated or not, to materially depart from the purposes for which they were originally associated, and compel a minority adhering to the original faith to follow them in this departure under the penalty of forfeiting all their interest in the property of the common association. With the changing of the individuals the Courts do not concern themselves, but the temporalities come impressed with the purposes of the founders, bearing the signet and superscription of those who gave, and in this direction and to this end the Courts will constrain their control and employment, whether it be a majority or a corporation which seeks to disturb and misapply. Demurrer overruled; ten days to defendants to answer.

CUNNINGHAM vs. DUNN.

DECISION RENDERED FEBRUARY, 1887.

Application for mandate to defendant as State Controller to require him to draw his warrant upon the State Treasurer and in favor of plaintiff as one of the Trustees of the State Insane Asylum located in the County of Santa Clara for compensation as Trustee. The only question presented by the petition and demurrer in this case is one of statutory construction. In the Act creating an additional asylum for the insane, approved March 9, 1885, was provided as follows: "Except in so far as limited or enlarged by the provisions of this Act, the said Trustees shall have the same powers, duties, responsibilities and obligations as are conferred by law upon the Trustees of the State Asylum for the Insane at Napa, and shall receive like compensation; provided, however, that during the construction of said hospital the said Trustees may receive from the State their actual travelling and other expenses while engaged in the duties of their offices, the amount of such expenses to be certified to and approved and allowed by the State Board of Examiners." (Statutes 1885, p. 38, Sec. 17.) Referring to the Act providing the compensation of the Trustees of the Napa Asylum, it reads: "Each Trustee shall receive as his compensation ten dollars for each meeting of the Board at which he shall be present, payable out of any moneys appropriated to the use of the asylum; provided, that the sum paid to said Trustee shall not exceed one hundred and thirty dollars per annum; and provided, further, that any Trustee whose residence is out of the county in which said asylum is situated shall be allowed, for travelling expenses, mileage at the rate of ten cents per mile for the distance necessarily travelled in attending the monthly meetings of the Board." (Statutes 1875-6, p. 135) Reading these two statutes together, as the reference made by the Legislature requires us to do, the construction certainly seems a very simple one. The Trustees of the Santa Clara Asylum are to receive the same compensation as the Napa Trustees. Such is certainly the plain reading and import of this provision; and no reason is perceived why the Legislature should not have so intended. The Trustees were fully commissioned, and were proceeding with duties as onerous, arduous and responsible in constructing these extensive buildings as would be imposed by supervising the management of the institution when in full operation. There certainly is no good reason why the Legislature should have made any distinction as to the compensation in the matter of such services. It is, however, insisted that the words "provided, however, that during the construction," etc., are terms of restriction, and limit the term "like compensation" to the period following the completion of these buildings. As already stated, no good reason appears why any such restriction should have been provided; and in my opinion the purpose of this proviso was not to restrict, but to enlarge, for a limited period. In the Napa Act it is provided that only the Trustees whose residences are out of the county shall be allowed, for travelling expenses, mileage at ten cents per mile. In the Santa Clara Act the Trustees are to receive like compensation as the Napa Trustees, and, distinguishing as to expense allowance, the Santa Clara Trustees are to receive *all* their travelling and *other* expenses without distinction as to residence or discrimination as to amount or character. The proviso was not to restrict as to time, but to enlarge as to expenses and do away with the fact of residence as a disqualification for the Trustees receiving them during the period that the buildings were in process of construction. When the buildings are completed, the enlarged operation of this proviso will cease, and the Trustees will only be allowed, with their per diem, ten cents per mile as travelling expenses, as now allowed the Napa Trustees. Let a peremptory writ issue, as prayed for.

SENTENCE OF CHARLES W. KING.

DELIVERED FEBRUARY, 1887.

I regret that with all the facts and circumstances in this case I can find so little to support the suggestions so earnestly presented by your counsel. I shall briefly recapitulate the testimony. It is thus:

Upon the 24th day of December you had a controversy with one Eikerenkotter. It was about a trifling sum of money. You claimed he owed you $10; he, that he held your note for $50. He had been formerly your partner, and the dispute arose about some settlement of your partnership transactions. He was passing your saloon that morning—presumably at that hour you were both sober—and you called him into the rear of the saloon, and with the most opprobrious and insulting language demanded payment, and made an assault on him there. That he was beaten in that contest is more than probable. He fled from your saloon, leaving his hat behind him, and showed his trepidation and fear by the fact that he did not dare to return, but sent a boy back for it. A few moments afterwards you armed yourself with a pistol and followed him to a distant saloon to which he had repaired. You went in such haste as to attract the attention of those in the saloon, and they warned Eikerenkotter of the fact that you were coming, and for him to leave; that your coming boded danger to him. He did not leave, but at the door of the saloon the proprietor interposed between you and him. You stood there with the pistol in your hand, attempting to point it at Eikerenkotter, who was apparently attempting to evade you. The proprietor of the saloon, Patsy Green, by physical force prevented your shooting him. You avowed your purpose of killing him. You called him every vile name to which you could turn your tongue, and avowed your purpose to kill him whenever the opportunity offered. He submitted to this opprobrious language, the vilest that could be addressed to a man. Your own statement was that in raising the pistol, you thought he had gone behind the counter to himself procure some weapon. Had he done so your course would have been equally inexcusable, wholly unjustifiable. You were the aggressor—the aggressor in the first contest, the aggressor in the insulting language you employed, the aggressor in pursuing him to the place to which he had retreated, the aggressor in the abuse you heaped upon him there, the aggressor in attempting to use the weapon that you carried to that place. Under the law of the State, and the law of morals, it was your duty as the first aggressor to have withdrawn if you deemed yourself in danger. Had he killed you there he would have been justified. Had you slain him, you would have stood at the bar of this Court today as a murderer. This is the situation of this case, unquestioned and undisputed; and were that all, it would be bad enough; but you, yourself, a witness on the stand, avowed that it was your purpose in following him there, and insulting him as you did, to induce him to attack you. You went prepared, had he done so, to kill him—a purposed, premeditated assassination, if ever testimony established or facts disclosed one. You intended to make your abuse so vile, so atrocious, so aggravating, that human nature could not endure it, and when he should resent it, you purposed killing him. I have had much experience in Courts; I have had much of wickedness before me; but a more deliberately premeditated and prepared for, though unaccomplished assassination, has never been presented in a Court over which I have presided. I have not yet stated all nor the worst. Foiled, failing in your purpose to procure this assault by the vile abuse you heaped upon this man, you added to it a charge of vile association against his mother, too utterly foul to be even hinted at; a charge as vile as the vilest mind could conceive, and expressed in language as foul and obscene as the foulest lips could utter. The man thus insulted was more forbearing than men usually are; more forbearing than sons are required to be, or he would have taken no heed of your weapon, no thought of your threat, would have made no estimate of the perils he was chancing, but with whatever weapons nature might have furnished, or opportunity offered, he would have attacked you there, though he had died at your feet. I wonder at his forbearance; I wonder I am not to-day, instead of judging an assault, passing sentence upon a homicide.

This is your case. You have been fortunate—fortunate in the man to whom you offered so fearful an aggravation—fortunate in the jury that in this crime thus premeditated, thus prepared for, and thus pursued, have found but a simple assault. Upon this atrocious offense I shall stamp the full measure of my judicial reprobation. I shall endeavor, so far as position and duty offer, to indicate the true measure of such depravity, and attach all the punishment that the verdict permits to be awarded to it. I purpose in the example you will afford to teach that men cannot thus arm themselves, and thus premeditate a crime, thus outrage all decency, and escape with impunity. As I have already stated, there is nothing in your case, nothing in your conduct, nothing in the circumstances attending it, that calls for the slightest lenity, but rather for the severest punishment. The judgment of this Court is that you pay a fine of $500, and that you be imprisoned in the County Jail of this county until the same be satisfied—for a term not exceeding 500 days. Mr. Clerk, enter the judgment. Mr. Sheriff, take the defendant into custody.

COUNTY vs. B. F. BRANHAM.

DECISION RENDERED MARCH, 1887.

I am unable to concur in the conclusions of my associate. Although the principles by which statutes are to be interpreted have long since ripened into maxims, still the factors with which these maxims deal are so variant that in practical application they stand less as rules to be rigidly enforced than as guides to lead or direct; less as precedents that absolutely bind than as practical suggestions that are to aid. A few of these leading propositions which to me seem especially applicable to the present case will be stated. "Statutory interpretation is the judicial ascertainment of the intention of the law-makers." (1st Kent's Commentaries, 468; City and County of Sacramento vs. Bird, 15 Cal., 294.) "And this intention is to be sought, not alone in the language employed, if that be in any way obscure or doubtful, but from the cause or necessity for the Act, or from any other circumstances existing at the time." (1st Kent Com., 462; People vs. Utica Ins. Co., 15 Johnson, 38; Dresseau vs. United States, 6 Cranch, 314; Donaldson vs. Wood, 22 Wendell, 397; and further, American Decisions and Notes, vol. 58, p. 589; vol. 65, p. 475; vol. 69, p. 181.) All statutes *in pari materia* relating to the same subject matter are to be construed together as though they were the "one law, and all enacted at the same time." (1st Kent Com., 463-464; Smith's Com., 639; People vs. Wells, 11 Cal., 329; People vs. Broadway Wharf Co., 31 Cal., 33; Taylor vs. Palmer, 31 Cal., 240; People vs. Jackson, 30 Cal., 427.) Such construction, if practicable, is to be given as will reconcile inconsistencies, avoid absurdities, and give some substantial and reasonable effect to every part of the statute, if this can be done without distorting or torturing the language employed. (Culberton vs. Mead, 22 Cal., 95; People vs. Southwell, 46 Cal., 148.) And the Court will endeavor to place itself in the position of the law-maker and contemplate in the first place the law as it previously existed, the probable purpose of the change, and will endeavor to give to the law such construction as shall accomplish the supposed purpose of the law-maker. (Donaldson vs. Wood, 22 Wend., 397.)

Prior to February, 1876, the Sheriff of Santa Clara County was compensated for all services by fees, as at that time were most of the Sheriffs of the State. By Act of February 10th, 1876, he was given a salary of $4,000, and it was further provided, "that in addition to the salary provided by Section 2 of this Act, he shall receive for his own use the mileage paid by the State for the transportation of convicts and insane persons." (Stat. 1875-6, p. 35.) In 1877-8 this Act was further amended, but not so as to affect the present question. April 9th, 1880, an Act was passed providing that Sheriffs should receive all expenses and a just and reasonable compensation for their own services in transporting prisoners to the State Prisons, to be allowed by the State Board of Examiners. (Sec. 1,586, Penal Code.) And at the same session and in precisely the same language similar provision was made for the Sheriff's expenses and compensation in carrying the insane to the asylums. (Section 2,221, Political Code.) March 14th, 1883, the County Government Bill was enacted. It substituted for fees salaries, and made of the officials agents for collecting fees from those receiving their services and paying the same into the County Treasury as a salary fund. It further provided that, "the salaries and fees provided for in this Act shall be in full compensation for all services of every kind and description rendered by the officers therein named, their deputies and assistants. * * * Provided, however, that the Assessor shall be entitled to receive and retain to his own use six per cent., etc. * * * And provided further that the Board of Supervisors shall allow to the Sheriff his necessary expenses in pursuing criminals, etc. * * * All expenses necessarily incurred conveying prisoners to and from the State prisons and insane persons to and from the insane asylums, which shall be allowed by the Board of Examiners and collected from the State." (Statutes 1883, p. 361.) This section was amended March 14, 1885, and upon the same day and as an independent statute was enacted "An Act to allow compensation to Sheriffs for conveying prisoners to the State prisons and insane persons to the insane asylums.

"Section 1. There shall be allowed by the State Board of Examiners to the Sheriffs for delivering a person to either of the State prisons actual expenses and five dollars per diem for time necessarily consumed in delivering such persons.

"Section 2. There shall be allowed by the State Board of Examiners to the Sheriff for delivering an insane person to either of the insane asylums his actual expenses and the same per diem as is allowed in Section 1 of this Act." (Statutes 1883-4, p. 126.)

The foregoing recitals, if they do not present all the legislation upon this subject, indicate that which must control its determination. That the County Government Act did in effect and by necessary implication repeal all former statutes as to the compensation of the Sheriff seems to me perfectly apparent. Its closing paragraph contained the usual sweeping clause, "repealing all Acts inconsistent with its provisions," while with the comprehensive phraseology both of declarations and of exceptions contained in Section 164, it seems to me quite impossible that any former statutes as to the compensation of this official could remain in force. If this be not so, it is difficult to see why the statute approved March 5th, 1870, and found on page 514, Deering's Political Code, is not also in force, and why the Sheriff of Santa Clara County is not to receive from the county fifty cents per mile for the transportation of prisoners and forty cents per mile for the conveyance of the insane—a construction that no one pretends, but this provision is not repealed unless the County Government Act in its general terms and by necessary implication repealed it. Whether, however, this be so or not, whether all these statutes as to services of this character are still in force, their contradictions and inconsistencies, to be reconciled as the Court best may, do not affect the rule by which the Courts are to construe and if possible reconcile them. These several statutes certainly relate to the same subject matter. They are in every sense of the phrase *in pari materia*. They each and all apply to the same class of services to be performed by the official, and for which compensation is to be made in the same way, and from the same source. This was the only purpose of the proviso in Section 164 of the County Government Bill, and this precise matter, neither more nor less, was all that was contained in the enactment of March 14th, 1885. Apply then the rule that statutes *in pari materia* are to be read and construed as the one manifestation of the legislative will; place the Act of 1885 in the section of the County Government Bill; read it then in reference to the phrase "actual expenses" in the same connection in which the Legislature have *ex industria* and as matter of repetition placed it; let it stand with its accompanying item, "actual expenses," under the proviso in Section 164, and I see no escape from the conclusion that this and both items must receive the same construction.

In the original Act the Legislature, by apt words, excepted from the general scope of the section "actual expenses," and made these the perquisites of the Sheriff. In the second Act they repeated verbatim this exception; they added to it a single item of the same generic as well as specific character; the conjunction "and" connects the two items; the one verb "allowed" governs them both; neither proviso nor punctuation separates them; the same verb "allowed" repeated that had been used in all the former statutes, acted upon by all former officials as giving to the parties for their individual use that which this repeated legislation and concurrent construction had awarded by the term "allowed." Again, as already stated, by the Act of 1880 most of the Sheriffs of the State, Santa Clara County with others, were allowed for these services compensation. The County Government Bill allowed expenses, but compensation, as before permitted, was omitted. In the next Legislature this item is again restored in the same language before employed, and in the same paragraph with the item for expenses which had through all these changes been secured to the Sheriff. There was in existing and antecedent legislation enough to have fully instructed the law-makers as to the connection in which these same terms had been before employed, and the construction that both had uniformly received. There was in existing legislation a section which clearly commanded what was to go to the county, with a proviso as to what might be retained by the official; and it is a feature of no slight significance that with both these provisions in legislative contemplation, it should have provided for this single item by a special Act, and thus linked it with the exception whose only purpose was to declare what the Sheriff might retain. Further, the result accomplished points to the same conclusion. The moneys in the State Treasury, like those in the County Treasury, are the funds of the people, the former replenished by contributions from the latter. Upon plaintiff's contention we have the Legislature with all solemnity enacting a law whose single purpose was to return these small sums from the State Treasury to the county depositories, from which they had just been supplied; and this, too, not upon any estimate or consideration of services performed or expenditures incurred, but as a legislative gratuity, measured by the number of days in which an uncompensated county official has been engaged about the work of the State. Some reasons may be suggested why the official whose time has been thus employed should be paid, none why the county which has expended nothing in these matters should receive this gratuity.

The titles of Acts are sometimes referred to in the legislative intention. Applied here, we have: "An Act to allow compensation to Sheriffs, etc.," both the words "allow" and "compensation" being the very terms employed in all antecedent and existing statutes, in which the pay allowed was beyond question the perquisite of the official. It is not necessary to determine that the Act with or without the aid of the County Government Bill repealed Section 1,586 of the Penal Code and Section 2,221 of the Political Code. Though I see no escape from the conclusion that if they did not repeal, they wholly supplanted them, read what is provided for by the Act of March 14th, 1885, with what is contained in the proviso to Section 164, and thus read compare them with the provisions of Sections 1,586 and 2,221; and there is absolutely nothing remaining of the latter, nothing not fully provided for in the former. I do not think, however, the Act of March, 1885, should be construed as repealing or intended to repeal anything. The Legislature simply allowed the official a single additional item of compensation not therefor provided, and they so connected this new item with a special proviso of existing legislation as to clearly manifest their intention that it should take the same direction as the other items of the proviso. The case of Adams vs. San Francisco, 50 Cal., 117, is not, as I understand it, in conflict with these views. Upon the contrary, the construction I apply is strengthened by that case. The case was as follows: "By Act of May 17th, 1861, the Sheriff of San Francisco was required to pay into the County Treasury all fees, percentages, commissions and other compensation, etc." Thereafter and in 1880, "the Codes allowed to the Sheriffs of the State certain mileage for transporting the insane and prisoners. * * * The Supreme Court held that the mileage was compensation and must be paid into the County Treasury." It is difficult to see how any different conclusion could have been arrived at. This mileage was compensation in its very character and purpose; compensation because the Legislature which allowed it so declared it. It was the same law-making power that in both statutes and in the same connection used the one word, "compensation"—compensation the Sheriff was to receive, and compensation when he received it he was to pay over. Read *in pari materia*, these statutes seem to me to construe themselves, and I see neither occasion nor room for judicial construction. There was not in that case, as here, a proviso and exception in the original Act to which subsequent legislation was to be annexed, and which called for construction as to probable subsequent intention; and in this, in my opinion, lies the distinction between that case and the one at bar.

It is unnecessary to pursue this discussion further. Judged from every standpoint, viewed in every light, I can but conclude that the Legislature by the Act of March 14th, 1885, intended the per diem therein provided for the use of the officer who was required to perform the services in question, and with this ascertainment judicial inquiry ends. This cause having been brought in Department Two, the decision of the Judge of that Court must control.

VAIL vs. MUET ET AL.

DECISION RENDERED MARCH, 1887.

This is an action brought by plaintiff to restrain the defendant from obstructing a road and preventing plaintiff's using the same and exercising the right of way over a strip of land particularly described in plaintiff's complaint, and constituting part of a tract owned and possessed by defendant Muet and one Neaiduct. By a large preponderance in the number of witnesses, as well as in the probabilities of the case, it is shown that for over twenty years a considerable number of persons who lived upon the place now owned by plaintiff, or in that vicinity, travelled over the line of this alleged road in order to reach a well established county road; that this use was for the last twelve years very frequent, and for the last nine years constant, with the knowledge of defendant and without any objection upon his part until the year 1886, when defendant established a gate at the crossing of this road and forbade its further use. The question of fact upon which, in my opinion, this case turns is found in the inquiry, Was this use with the license or permission, expressed or implied, of the defendant, or was it exercised and asserted as of right by the users? None of the persons who used this road are shown to have done so by any permission of the owner, and the defendant, examined as a witness, disposed of the question of license in these very decisive terms:

"I never gave any one permission to travel on this road, but they did travel on it all the same."

The defendant further testified that for a series of years he plowed and grew grain upon a portion of the site of this road.

As to the fact, frequency and extent of this plowing there is a dispute, but I consider that defendant is correct, and that this field, including the road site, was frequently plowed and crops grown thereon. Nor does that fact affect the plaintiff's claim. It may have made the passage over this route less agreeable, but it did not prevent it.

As says one of the cases, the party plows his field, he does not plow the easement. Depending as a result of ordinary tillage, a party's use of a privilege, and preventing or forbidding the use, are very different propositions, both in fact and in legal effect. The one may be entirely consistent with the recognition of the owner of this easement, the other is the absolute denial by the one of the other. Further than this, if an inference against this easement is drawn from the plowing of its site by the owner of the soil, whereby passage is somewhat impeded, a much more significant one follows from the fact that the party continued to use the road, notwithstanding this cultivation, to the great damage if not entire destruction of the crops over which he passed.

As already stated, the preponderance of proof, corroborated as it is by the assertion of the defendant, is that this uninterrupted use by plaintiff was not by permission.

Independent of direct proof, the legal presumption is in the same direction. Says the Supreme Court: "The use of the easement for five years, unexplained, will be presumed to be under a claim of assertion of right, and adverse not by leave of, or favor of the owner." (Kripp vs. Curtiss and Payne, September 22, 1886.)

This rule, quoted by our Supreme Court from 5 Denio, N.Y., would, independent of the leading authority in this State, seem to be well sustained by reason.

If the presumption were the other way it would require the party asserting the right to establish a negative, that he was not there by license. Further than this, such a use is upon its face and in its very act an invasion of the property of another, a diminution of his estate, a trespass upon his right: and it may well be assumed that the party who submits to this should be taken rather to have conceded the right than to have consented to an act thus prejudicial to himself.

A case in England, December 28, 1884, is relied upon by defendant. In that case there had been a continued use and enjoyment of a right under circumstances much like the present, and the lower court found that this was with the implied permission of the owner of the land. Said the Supreme Court:

"In the absence of the testimony we are bound to suppose there was evidence sufficient to support this and the other findings."

In the present case the decided preponderance of testimony is that no permission was asked, that permission was never given. Under such circumstances an adverse right by presumption must be deemed established.

ENNIS vs. KERR ET AL.

DECISION RENDERED MARCH, 1887.

The plaintiff, a grown man, rented in his own name and right a tract of about forty-six acres; upon this tract by his own labor he produced the barley now in controversy. Upon this tract so leased resided the father, mother and brother of plaintiff. The father, Michael Ennis, was physically as well as mentally incapacitated. The brother being physically infirm, the family is wholly supported by the efforts of plaintiff. Upon the 29th of July, 1886, plaintiff began hauling the barley by him so raised to the warehouse of Kerr in San Jose, and his father, Michael Ennis, accompanied him on his trips. At the warehouse, while plaintiff was unloading and storing the grain, the defendant Strauss entered into conversation and negotiation with the father, Michael Ennis, about the barley. The father said it was old barley; Strauss said if it was he would give $1.30 per cent. for it. The father said it was, and thereupon directed the warehouseman, Kerr, to insert in the pass-book, which the father was carrying, the name of Strauss as the owner of this barley. Kerr did so. None of the witnesses testify that plaintiff heard or knew what was passing between his father and Strauss. He certainly took no part whatever in it. The plaintiff himself testifies that he knew nothing whatever of it. The day following the delivery of this barley the plaintiff examined the warehouse receipt, which was still retained by his father. Seeing the name of Strauss there written as the owner of this barley, he questioned his father concerning it, and was then informed of the transaction between the latter and Strauss. He at once and upon the same day called upon Strauss, stated that this was a mistake, that his father had no interest in the barley and no right to dispose of it, and asked that he make such correction as should restore to plaintiff the control of the grain. He, on the same day, made a similar statement to and demand of Kerr, the warehouseman. Both Strauss and Kerr refused to recognize plaintiff as having any rights to the grain and both refused to make any correction. There is some excuse for the warehouseman's refusal. The receipt he had given and which was outstanding against him showed the ownership of this grain to be in Strauss, and he might with prudence hesitate at recognizing a claim adverse to his own written acknowledgment. For the refusal of Strauss I see no excuse or explanation. He had paid nothing upon the barley, and if he had been put to the least inconvenience it was not shown. The day after the transaction he is informed that the father's action was without knowledge or consent of plaintiff, and why he should not at once make the correction or inquire as to the fact is not perceived. Farther than that, the grain was not what the father represented it to be. It was not old barley but was of the crop 1886, and was worth 25 per cent. less than what he had contracted for.

It is insisted that this was a scheme upon the part of the plaintiff and his father to induce Strauss to purchase and pay for this as old barley. There is nothing in the testimony or conduct of the parties to indicate any such purpose. The plaintiff made no demand upon defendant for any payment, in no way recognized the transaction as binding upon him. The very day after the barley was delivered at the warehouse he presents himself, not with an attempt to reap the fruit of a fraud or a trick, but with a demand for the correction of a mistake.

The fact that the father spoke of the barley, the land, etc., as his has no significance whatever. As members of the same family, parents or children, and usually servants and employés, refer to the common domicile in the same terms which are used to indicate ownership. This is a fact too frequent and too well understood to be permitted to control in effect the actual fact.

The plaintiff claimed that besides the return of the barley he should be allowed as damages its enhanced value as of any period subsequent to defendant's refusal. Several very difficult questions must follow from that view of the case. They must not be considered, in my opinion; enhanced value as an element of damage, and as provided in Section 3,336, Civil Code, applies only to action of trover when there has been an actual conversion and when only a money judgment can be recovered. This action is replevin, and a different rule applies. (Kelly vs. McKellen, 54 Cal., 185.)

Judgment for plaintiff for the barley described in this complaint, and restitution, and if the same cannot be had, for $299.99, its value, and costs of suit.

CHAPTER XXI.

THE TURNPIKE CASE.

DECISION RENDERED MARCH, 1887.

THIS is a proceeding to compel the Board of Supervisors of Santa Clara County to fix a rate of tolls collectable by plaintiff upon its toll road.

For the petitioner it is claimed that the questions involved in this case have been authoritatively determined in its favor by the Supreme Court of this State. I shall therefore first enquire as to what has been decided in the cases relied on and referred to.

The People vs. Pfister et al., 57 Cal., 532, was a *quo-warranto* in the name of the State against the present petitioner. It was then asserted upon the part of the People that the defendants in that proceeding falsely asserted they were a corporation authorized to operate a toll road and collect tolls thereon, and were in fact collecting such tolls; wherefore the People prayed judgment prohibiting the defendants from asserting such right of exercising such franchise. To this proceeding the corporation answered at length. It set forth its original incorporation, the construction of a road and the right to collect tolls thereon; that it was incorporated for a period of twenty years; that before the expiration of that period, in conformity with the provisions of the Political Code, it elected to continue its corporate existence for the term of fifty years; that it took the steps required by the Code for carrying out this intention, and that it did thereby continue its corporate existence for such further period of fifty years, and with it the right to enjoy and exercise the franchise in question, etc.

In the District Court of this county it was determined that the defendant had extended its corporate existence by these proceedings, and that it was rightfully in the exercise of the franchise in question. From this decision the People appealed and the judgment was affirmed, the Court holding that under the election and Acts of November, 1876, the corporate existence was continued, and that with this existence went the right to collect such tolls as the Board of Supervisors might allow. That both these propositions were considered by the Court and fully determined is no less apparent from the language of the Court than from the dissenting opinion of Justice Ross, who, while conceding that the corporation might have prolonged its corporate existence by these proceedings, denied that that prolongation carried with it the right to collect any toll beyond the original period of twenty years for which it was incorporated.

This decision has been followed in several subsequent cases. It is fair to presume that upon the faith of it other corporations have extended their corporate existence and valuable rights have been acquired, and that it has become, to a very important degree, a rule of property not now to be lightly departed from.

The present is the second case in which the Turnpike Company demanded of the Board of Supervisors that it fix a rate of tolls for this road. The Board refused so to do, and the corporation petitioned for a writ of mandate. This Court was of opinion that the party applying for such a writ must aver itself to be in actual possession of the road upon which it asserted this right. Upon appeal the Supreme Court, without indicating what were and were not essentials to such an application, held that from the entire petition sufficient facts appeared to entitle the petitioner to the relief demanded.

The recitals from which this was deduced are as follows:

"Such corporation, during all the times aforesaid, has had, held, owned and been entitled to, and yet is entitled to, the enjoyment of the following rights, privileges and franchises, to wit: Of owning and possessing and operating that certain highway, * * * " etc.

Applying the Supreme Court decision to this pleading, we certainly have it determined, and in the very case, that the right to own, the right to possess and the right to operate a toll road entitle the party to the relief here sought, without reference to the further fact that he does possess or is operating. This was the distinction which this Court asserted, and which the reversal by the Supreme Court determined was not well taken.

The opinion of the Supreme Court in this case was filed April 2, 1886. Before that time, August 6, 1883, the Supreme Court decided the case of Weaverville, etc., vs. Board of Supervisors of Trinity County. That case was on all fours with the case at bar: "The plaintiff had incorporated itself to operate a toll road. It in some way obtained possession of a waggon road which it was incorporated to construct and operate. It applied to the Board of Supervisors to fix the rate of toll, which they refused to do. It applied to the Superior Court for a mandate to the Board, which was denied."

Upon appeal said the Supreme Court: "Possession was *prima facie* evidence of ownership. Whether that was based upon paramount title or not cannot be inquired into in this proceeding, nor in a proceeding to determine whether the Board shall perform this duty or not. It is clear that the question of title cannot be inquired into in this proceeding. It is equally clear that the Board of Supervisors could not inquire into or determine the right of the appellant herein to exercise the franchise which it has been exercising for nearly twenty years." (64 Cal., 72.)

With my construction of the petition in Pfister vs. the Board it is not easy to reconcile that decision with the case from 64 Cal. above cited. If, as was held in the latter case, the right of the party to the road, or his title as a source of right, cannot be tried or considered by the Board, by what are they to determine that it has any right which the Board should recognize? Actual possession seems to me to be all that is left, all of which, under these decisions, the Board can take cognizance. That is a physical fact, apparent to the senses—a tangible and visible indicia of right, and capable of the most simple and conclusive demonstration.

The right to possession, upon the other hand, may depend upon considerations of the greatest intricacy, testing to the utmost the resources and capacity of the Courts. If, then, the Board are not permitted to inquire into the question of title as the source of actual right as against the fact of actual possession, it is not perceived how they can be required or permitted to grant or withhold this privilege upon a necessary construction as to title or right, when unaccompanied by any pretense of possession in fact. It is of course well understood that from possession title will be presumed, and equally true that from title the *right* to possession will follow. This is, however, a mere presumption, and may as to both instances be avoided or defeated by countervailing proofs. In this proceeding plaintiff's possession, as well as right of possession, of this road are disputed here—presumably were disputed before the Board.

As to the right, the Board were precluded from investigating, and I do not see upon what theory the Court can hold the Board in the wrong for not doing what under the law they are not permitted to do. As to actual possession—possession in fact—there is no proof before me that this was shown before the Board, while upon the trial in this Court it was conclusively proved that plaintiff, when it applied, in May, 1882, for this order, was not and had not for over four years been in the possession of this road or exercised any acts of ownership over it.

The Secretary of the plaintiff testified that from November, 1877, to the present time the plaintiff had done nothing whatever upon this road; that it had neither collected tolls, made repairs, nor in any way exercised any acts of dominion or ownership over it, and that he supposed for these ten years the public had been in possession of the road. This statement was not only not contradicted, but it was shown that during this period the road was kept in repair by the county officials and at the county expense. There can be no question that from November, 1877, to the present time the plaintiff had no actual possession whatever of this road; had exercised no dominion, no act of ownership, upon it.

Upon the authority of the cases above cited I hold that such possession is essential to the enforcement of the claim here contended for. Nor is the rule here applied peculiar to this class of cases. The same principle and practice obtain when a party seeks to recover for matters severed from the land while he is out of possession, it being the settled rule that he must re-establish himself in the possession of the realty before he will be suffered to litigate his claim to the things severed from it. (Halleich vs. Meyer, 16 Cal., 574; Page vs. Fowler, 39 Cal., 417.)

A number of other questions are presented in this case affecting the plaintiff's right to recover at all in any proceedings. One is that plaintiff's right was barred by the interval elapsing from the refusal of the Board to the institution of this proceeding; and it is further contended that when this demand has once been made and refused there can be no renewal of the right by a renewal of the demand. I deem it unnecessary to express any opinion as to the effect of the statute upon the demand now sued upon. Many very difficult questions present themselves upon either side of this proposition; but the plaintiff, having made one demand and met with a refusal, cannot under a proper condition of affairs renew his demand and thereby lay the foundation of a new right, I make no question.

The other objections urged and argued upon behalf of defendants go to the right of plaintiff to occupy this road. The effect of a contract with the county by which a certain portion, part of a former highway, should be surrendered, and the effect of subsequent legislation upon this contract, are all propositions of right, dependent upon considerations of legal construction. They were not cognizable by the Board under any circumstances, nor by this Court in the present proceeding, and any present consideration of them would be alike premature and futile.

Application for a writ denied.

BAPTIST CHURCH SUIT.

DECISION RENDERED JULY, 1887.

Plaintiff avers that ever since the 25th of January, 1887, it has been and still is a religious corporation under the laws of this State. That as such it is the owner and entitled to the possession of the certain lot of land located upon the corner of San Antonio and Second Streets, San Jose, and occupied by the church edifice of plaintiff. That in an action tried and determined in Department Two of this Court, in which certain of these defendants as individuals were plaintiffs and certain other individuals named were defendants, it was adjudged that plaintiffs in that suit were entitled to the possession of said premises against said defendants. That the plaintiffs in said action are about to cause process to issue upon said judgment placing them in possession of said property. That the defendant Branham, as Sheriff of this county, will execute said process, and that this plaintiff will be removed from said premises and from the control and management of the same, to its irreparable injury. Wherefore it prays that said defendants be enjoined, etc.

To this defendants answer and deny that plaintiff is or ever was a corporation or that under the statute it could become one. They further set up the judgment and decree of Department Two, before referred to, and aver that plaintiff is estopped and concluded thereby. They further deny that plaintiff is entitled to the possession of said property.

Is plaintiff a religious corporation? Upon the 25th of January, 1866, the statute of this State relating to such incorporation was as follows:

Section 175.—"It shall be lawful for all churches, congregations, religious, moral, beneficial, literary or scientific associations or societies, by such rules or methods as their rules, regulations, or discipline may direct, to appoint or elect any number, not less than three nor more than fifteen, as trustees or directors, to take charge of the estate and property belonging thereto, and to transact all affairs relative to the temporalities thereof. * * *"

Section 176.—"Upon the appointment or election of such trustees or directors, a certificate of such appointment or election shall be executed by the person or persons making the appointment, or the judges holding the election, stating the names of the trustees or directors; the name by which said corporation shall thereafter be called and known shall be particularly mentioned and specified in the certificate made at the first election of trustees or directors."

Section 177.—"Such a certificate shall be acknowledged by the person making the same or proved by a subscribing witness thereto before some officer authorized to take acknowledgment of deeds, and recorded, together with the certificate of such acknowledgment or proof, by the clerk of the county within which such church, congregation, religious, moral, beneficial, literary or scientific society or association shall be situated."

Section 178.—"Such corporation may have a common seal and may alter the same at pleasure. The trustees may take into their possession all the temporalities of such corporation, whether the same shall consist of real or personal estate, and whether given, granted, or devised directly or indirectly to such association or corporation, or to any person or persons for their use, and in the name of such corporation may sue and be sued, may hold and recover all debts, demands, rights and privileges, all the churches, burying places," etc. * * *

In these sections is clearly prescribed what may incorporate, the method to be pursued and the rights and duties which follow.

Is the association conceded to have been formed in this case capable of organizing as a corporation? Of the General Baptist Church, both from its antiquity, its prominence and permanence, the Court will take notice as a matter of general history; and this shows that however remote its origin may have been, it has had upon this continent a well recognized and continued existence as a religious body of the Christian faith for over two hundred and fifty years, and that its denominational tenets have been defined with a precision and maintained in practice with a strictness which is a matter of universal knowledge and understanding; that in the year 1850, its membership in the United States was nearly three-quarters of a million, and that this had increased until at the present time it is probably over three millions in active membership.

In May, 1850, the Rev. O. C. Wheeler, as the missionary representative of the Baptist Church, visited San Jose. He placed himself in communication with those residents who had been members of the Baptist Church elsewhere; and as the result, at a meeting held May 19th, 1850, and presided over by Mr. Wheeler, it was resolved "that we proceed to constitute ourselves into a Church of Jesus Christ by the name of the First Baptist Church of San Jose, for the maintenance of the Gospel and our mutual encouragement and growth in grace."

Following this resolution are the names of a number who are represented as presenting letters of "dismission" from other churches.

From the date of these proceedings, viz., 1850, to the present time, these records recite in an unbroken series of proceedings the acts which it may reasonably be supposed would characterize a religious organization—the baptism of individuals; the admission of members upon letters from other Baptist Churches; the giving of letters of dismissal; calling of ministers; appointment of delegates to a variety of conferences of the Baptist Church called elsewhere; the regular election of officers; the purchase for church purposes of sites; erection of churches; collection of funds, etc., etc. All these and many other of the actions of this body are set forth with a minutiæ and detail not always found in the records of kindred organizations.

If a body of individuals thus selected, organized and constituted, is not a "religious association or society," within the meaning of these terms as employed in the statute, I am unable to see to what the statute is intended to apply.

It is further insisted that the special polity of the Baptist Church is such that it cannot be brought within this permission to incorporate; and a witness of high standing and large experience in this church so testifies as to his understanding, and further states this to have been the opinion of lawyers consulted upon the question.

No reason is given for this opinion, no substantial one is perceived. It was shown that in the Baptist Church each organized society is wholly independent; that no superior or supervising organization is recognized; that whatever action or influence councils or conferences of this church may exercise, it is purely advisory, and without any binding or obligatory effect upon the society to which it may be addressed.

With this the wholly independent character of these societies, there can be nothing in the general polity of the church which can in any way control the individual society in this or any other respect. Each of these is, and must be in this regard, a law and a rule to itself; and so far as is here disclosed, nothing is to be found in the rules, regulations, or discipline of this church permitting or preventing its incorporation at will.

As, however, the language of the statute is "by such rules or methods as these rules, regulations, or discipline," may direct to appoint trustees, etc., * * * Counsel argues that unless these rules and regulations in terms authorize this power, it cannot be exercised. I do not agree with counsel as to the purpose and meaning of this provision. In my opinion it was intended neither as a permission nor a restraint upon the power of the society to incorporate, but merely a direction as to the method in which that purpose is to be indicated—the sense of the society taken.

They are to take the same course in selecting trustees to represent them as a corporation that they do in the selection of other officers, and in the general management of their society affairs.

It is further insisted that in the State of New York it has been determined that this Church is not capable of thus incorporating. Decisions are cited from that State as indicating this inability, and the case of "Nolersten vs. Bullions, 11 New York, 243," is principally relied upon by defendant in support of this contention.

I do not so read this decision. The principal point there determined was, "that when a religious society incorporates under the law of that State by the election of trustees as regulated by the statute, it was the society as a body, and not merely *the trustees*, that founded the corporation, and that the trustees were merely the managing officers of the corporation.

Further, the Court in its opinion, referring to the general practice in that State, and under that statute, cites a large number of instances of religious incorporations, and with them "The Baptist Church and Society of Sweden," showing that it was at least then understood that "The Baptist Church" was capable of incorporating in the "State of New York," and farther, that in determining as to the fact of incorporating, the qualification of trustees and the mode of selecting them, the Court could prescribe no other rules, methods, or qualifications than those provided by the statute.

If in the views indicated I am correct, these persons constituted a "religious association," capable of incorporating as such, on the 6th day of January, 1866.

Upon the day last named the annual meeting of the society was held for the election of officers and the transaction of other business. With the officers selected five trustees named were elected. The meeting was presided over by Henry Giles, then the pastor of the church, and its proceedings are attested by J. H. Way, the regular clerk. With the other business then transacted, appears upon the minutes as follows: "The trustees were empowered to have the certificate of incorporation prepared and recorded." In pursuance of this direction of January 6, 1866, the following certificate was given:

"State of California, County of Santa Clara. We, the undersigned, do hereby certify that at a meeting held at the City of San Jose, in the County of Santa Clara, in the State of California, on the 6th day of January, A.D. 1866, for the purpose of incorporating and electing five trustees of the First Baptist Church of San Jose, a religious corporation, Henry Giles and Thomas H. Way were duly elected judges of election, and thereupon the said five persons hereinafter named were severally and duly elected trustees of said corporation, to wit: F. E. Adams, T. H. Way, Stillman Thomas, Gorham P. Beale, and J. Kouse, and we do hereby farther certify and particularly mention and specify that at said election, which was the first election of trustees of said corporation, it was unanimously resolved that said corporation should thereafter forever be called and known by the name of The First Baptist Church of San Jose, that being the name by which said corporation shall be called and known.

"In testimony whereof the said judges of election have hereunto set our hands and seals, this 25th day of January, 1866.

"HENRY GILES, (Seal)
"T. H. WAY. (Seal)"

Following this certificate is an acknowledgment of these parties in statutory form and indorsement by the County Clerk of Santa Clara County of its record upon the same day.

Comparing the record of these proceedings and the recital of this certificate with the sections of the statute above quoted, it is apparent that whoever, lawyer or layman, conducted these proceedings and drafted this certificate, he had before him the open statute prescribing the steps to be pursued; for there is not a requirement of the one that is not recited with technical accuracy in the other. It may be confidently asserted that if the methods here pursued have not incorporated this association, one can never be established under the statute. Under the authority a less vigorous compliance with the statute would have sufficed. (Spring Valley vs. San Francisco, 22 Cal., 435; People vs. Sac. V. N. N. Co., 45 Cal., 309.)

Full and exact, however, as were the steps pursued, objections are urged to their sufficiency which will be considered.

First—That neither the minutes nor the certificates show who were present when the resolution to incorporate was passed. The answer is that the statute does not require that either should do so. Further, it is not understood that the records of any corporation ever attempt to recite the names of those who are in attendance, and if they are required to show any, this must be all—a proceeding utterly impracticable, if not in many cases impossible.

Second.—That it does not appear who presided at this meeting or was authorized to give this certificate. The record does show who presided at this meeting and who was the clerk, and the certificate who were the judges of the election. The statute does not require that the minutes shall repeat any of these facts. The minutes do show what was ordered at a regular meeting; the certificate, what was done in pursuance of this direction; and there is every reasonable intendment that all formal and intermediate steps requisite were properly taken. (Angel vs. Ames Corporation, 289.)

There is a further rule that might be involved were it required; that is, that a corporation holding itself out as such as this has done cannot have its existence called in question by this form of attack.

I do not deem it necessary to recapitulate the many instances in which this has been done. It may not be uninstructive, however, to show the construction which all the parties placed upon this action before this controversy was inaugurated.

At the regular annual meeting of the church, January 6th, 1879, a resolution providing for the sale of certain real estate of the corporation was read and spread upon the minutes, ordered done. In these resolutions appeared the following recitals and references:

"At the regular meeting of the Board of Trustees of the corporation, the First Baptist Church of San Jose * * * unanimously resolved for and on behalf of said corporation * * * and it is resolved by said corporation to sell and convey, etc." * * *

* * * *

To this explicit assertion of their corporate existence thus formally made and recorded at a regular annual meeting of this church, neither dissent nor question seems to have been made, then or thereafter; they certainly then all understood and declared themselves a corporation. It is further insisted that in order to transfer the real property from one set of trustees to their successors in office all must unite in a deed, and the rules pertaining to strict transfership are involved. Those rules have no application here. As said Judge Lester in the case before cited: "This class of officers receive their authority directly from the sovereignty of the State. The statute prescribes their qualifications, the mode of their election and the revenue of their offices. There is a wide difference between this description of officers and mere private trustees whose powers rest solely upon individual contract." (§ 11 New York, Ibid.)

Independent of decisions, the statute disposes of the question. "The trustees are to take into their possession all the temporalities of such corporation or association, whether real or personal, whether given, granted, or designed, directly or indirectly, to such association or to any person or persons for their use." (§ 175, Ibid.)

They take by virtue of their office and through the operation of law, without regard to transfers made or refused by their predecessors. Such is the plain reading of the statute. Such I understand to be the universal practice in all corporations. To compel formal conveyances at every change in the trustees of a corporation would lead to the most intolerable inconvenience and embarrassment. It is further insisted that the controversy and its determination between certain individuals had in Department Two of this Court is conclusive upon this plaintiff. To give a judgment to this effect it must appear that it was between the same parties. An inspection of the record in that case shows that this corporation is in no way a party or referred to. In Nolen vs. San Gregorio Co., a suit was pending between certain individuals. The San Gregorio Co. as a corporation appeared and answered, and judgment went against it. Upon appeal, said the Court: "The corporation has never been made a party to the action, and has not had a day in Court." The judgment was set aside. (55 Cal., 164.)

If a corporation thus appearing is not concluded, how can this plaintiff be estopped when it has never been cited or in any form appeared?

It was argued that as individuals now actively representing plaintiff knew of and were present at the former trial, that fact in some way attaches to and concludes plaintiff. "However fully a party may be informed of a controversy between others as to a matter in which he is interested, unless he is cited to appear, or does appear in the action, he is in no way affected by the result of such litigation." (Pico vs. Thelster, 14 Cal, 203.) The test is: "Had this plaintiff a right to control the conduct of the former action?" (Stokes vs. Woods, 45 Cal., 445.) It certainly had not. Not only was it not a party as a corporation, but the present trustees were not parties as individuals.

If the rule contended for by the defendant be sound, it follows that a person informed that strangers are litigating as to his property must force himself into such controversy or be concluded by its results. It is farther insisted that the claim here asserted by plaintiff is in some measure an interference with what was determined in Department Two of this Court relating to this property. Neither myself nor the learned Judge of Department Two so understood it.

That case was a number of individuals originally united in a religious association by community of faith and feeling, and thus united acquiring certain temporalities as a means to the exercise and enjoyment of their peculiar religious tenets. It presented this association as thereafter divided into two parties, each asserting, as against the other, the better right to the control of these temporalities: the one as being a numerical majority; the other by its conformity to the doctrines and faith of the original association, and the non-conformity in essentials of the majority. These were the parties and this the question then before the Court; and Judge Spencer had only to consider, and did but determine, which of those contesting parties was in conformity with the faith and the purposes of those who formed this original association and endowed it with these temporalities. Not only was the corporation not before the Court, but the very existence of any corporation was by both parties expressly disavowed at the trial.

With the principle announced and conclusions reached by my associate in that case I fully agree. I do not understand that it is in the power of a majority of the members of a religious association, incorporated or not, to materially depart from the purposes for which they were associated, and compel a minority adhering to the original faith to follow them in this departure under the penalty of forfeiting all their interests in the property of the common association. With the changing views of individuals the Courts do not concern themselves ; but the temporalities come before them impressed with the purposes of the founders, bearing the signet and superscription of those who gave. Those purposes the Court will endeavor to ascertain by interrogating the faith and objects of those who endowed and the views and practices of those who employ. Nor will it permit the latter, whether a corporation or a majority, to divert this property from the purposes for which it was given.

No such question is now presented. Neither the faith nor the practice of those controlling or seeking to control this property are drawn into the present controversy ; but a corporation presents itself, created by the sovereign power of the State, clothed with certain powers and charged with certain duties. It asserts its existence, invokes the law, that gave it being and insists that those rights with which the law invests it shall not be wrested from it in a contest to which it was a stranger.

Other objections were made as to the non-performance by this corporation of certain duties imposed upon it by law. As to these, it is sufficient to say that such failure does not work a forfeiture of its corporate existence at the will of a private citizen. The State alone can urge such objections, and that by a direct proceeding at the instance of the Attorney-General. Until office found, (?) a corporation once created cannot have its existence collaterally called in question.

I have thus considered the principal, if not all, of the objections urged by counsel. In my opinion, plaintiff is entitled to the relief it seeks. The injunction heretofore ordered will be made perpetual.

BERNHARDT vs. SCHIELE.

DECISION RENDERED JULY, 1887.

1.—In the latter part of January, 1887, G. O. Metzger was the owner of a tract of land consisting of about 294 acres in the County of Santa Clara.

2.—V. Koch was acquainted with Metzger and with the land. He also knew that the latter desired to sell the land, and ascertained that it could be bought for $150 per acre.

3.—Believing that an advantageous purchase could be made of the tract he communicated these facts to Charles Bernhardt and C. M. Schiele, the present litigants, and the three visited and examined the tract in question. They agreed that negotiations should be opened with Metzger for the purchase of the tract, and that if it could be purchased for a less price the effort should be made. That Schiele should take one-half, Bernhardt one-fourth, and Koch one-fourth. It was then understood that V. Koch was not acting for himself but for his brother.

4.—It was agreed by the three that V. Koch should write to Metzger concerning the land, which he did, and Friday, January 28th, Metzger came to San Jose. He was met by Schiele, at whose hotel he lodged. Some conversation was had about the land, but of a general nature until Monday, 31st, when Schiele offered Metzger first $32,000 and then $34,000 for the tract. Mr. Metzger refused to take less than $150 per acre or $36,000 for the land.

5.—With this, the final terms of Metzger, Schiele went to Koch and informed him of the price that would have to be paid. Koch replied that his brother was afraid. He said he would see him. He did so, and reported to Schiele that his brother would not go in and must be left out. Schiele then waited upon Bernhardt and stated to him what he had told Koch, and further that what was done must be done at once. Bernhardt hesitated, said $36,000 was a large sum of money; that there was no need of haste in the matter, and that he himself had no money. Schiele then said, "You come up to the hotel and see Metzger, and if you don't take it I will take it myself."

6.—To this Bernhardt made no reply and Schiele returned to the hotel. Bernhardt did not come, and Schiele informed Metzger that the parties who had been acting with him had backed out and that if he went on he would have to take it himself, and that he did not think he was able to do so. Metzger replied that that need not prevent him buying the land, that he would make the terms such that he could manage it, and that he would let him have it for $500 down, $5,000 on the first of April, and the balance to be secured by mortgage. To this Schiele agreed, and a written contract was then made by which Schiele was to have the land for $36,000 upon the terms above stated. Metzger and Schiele both signed the contract and Schiele paid Metzger the $500 required. Metzger and Schiele were the only parties named in the agreement.

7.—Upon the evening of the same day, January 31st, Schiele met Koch and informed him of the contract he had made, and also soon after on the same day met Bernhardt and informed him. Bernhardt expressed a wish to see the contract, and went with Schiele to his place of business, when the latter produced the agreement and it was read by Bernhardt. The latter said it was not so drawn as to bind Metzger. Schiele said he was satisfied that he would get the land or get back his money.

8.—Bernhardt did not at that time claim to have any interest in this contract, nor did he pay or offer to pay any part of the $500 that had been advanced by Schiele.

9.—Seven days after Bernhardt claimed to Schiele that he was to have had an interest in the land and inquired why he had not been included in the agreement. These assertions were made at various times and were the subject of angry altercations between the parties. To these assertions of Bernhardt, Schiele made different answers—generally, that Bernhardt had backed out of the trade and that he had not put up this money as he should have done. In none of these answers did he admit that plaintiff was then in any way interested in the trade, and at none of these times did Bernhardt offer to pay any money to Schiele upon this trade.

10.—Immediately upon the making of the contract with Metzger, Schiele placed the property in the hands of a real estate agent for sale, and upon the 9th day of March, 1887, a sale was effected at $200 per acre, an advance of about $12,000 upon the price paid by Schiele. The fact of the last sale having been made was published in the newspaper on the same day, and was generally known by those interested in similar business. Upon the afternoon of the same day Bernhardt met Schiele and informed him that he knew of the sale, and asked him what he was to have from it, to which Schiele replied, "all you put in—nothing."

11.—Upon the 31st of March, 1887, Bernhardt tendered to Schiele $3,400 in gold coin as his half of the amount to be paid under the contract with Metzger and demanded a conveyance of one-half the land, and tendered a deed duly prepared, and demanded that he sign the same. Schiele refused to receive the money or to sign the deed, and then and ever since denied that Bernhardt had any interest in said contract.

12.—There was between none of these parties any other writing whatever than the contract between Metzger and Schiele before referred to; nor has there been any money paid or tendered other than the money tendered upon the 31st of March by Bernhardt to Schiele. The following are the conclusions of law:

13.—That by the acts, conduct and declaration of Bernhardt upon the 31st of January, 1887, when informed by Schiele of the terms of Metzger and of the necessity of at once acting in the matter, Bernhardt abandoned and withdrew from said enterprise and had no further claim upon or interest with Schiele in the matter.

Judgment that plaintiff take nothing by his bill, and that defendant, Schiele, go hence with costs established by the evidence.

THE OPINION.

THE LEGAL REASONS WHY PLAINTIFF CANNOT RECOVER.

The opinion, after reciting the cause of complaint, is as follows:

It is conceded that the three original parties proposing to purchase the tract of Metzger thought that it could be purchased for less than the original price asked of $36,000, and that it was understood this should be attempted. It is proven that the effort was made by Schiele and failed; that the latter then informed V. Koch of the result and was earnest that he should buy at the price asked, and that Koch refused; that he did make the same statement to Bernhardt, and for the same purpose, and that he did immediately thereafter inform Metzger that the parties who had been acting with him had "backed out," that if the purchase was made he had to carry it himself, and that he did not feel able to do so.

I find in this conduct and these statements much to support Schiele's assertion that when he informed Bernhardt what had to be paid for the land and they "must act at once," the latter did object, and in fact and effect did decline to proceed further.

That Schiele did urge and was most anxious that Koch should go on with the sale is certain. There was the same reason why he should have been equally urgent with Berhhardt, with the farther one, that if Bernhardt also withdrew, Schiele, if he went on, would have to carry the whole transaction with all the possibilities himself. Schiele did inform Metzger that the parties had both withdrawn.

This was certainly so of Koch. Both by relation, interest, object and action there was every indication that it was equally true of Bernhardt. There certainly was every inducement on the part of Schiele to keep these parties with him. The evidence, to my mind, is conclusive that he made every effort to do so. When he returned and informed Metzger that his associates had withdrawn, that if he went on he would have to take the whole matter himself, and that he had not the means to do so, it was an avowal which he might well have expected would be taken as a relinquishment upon his part of the enterprise, and that Metzger would so act upon it. That Metzger did then propose terms more favorable than he could have expected was no more owing to Bernhardt's co-operation or suggestions than it was to Koch's.

When Bernhardt that evening read the contract, he informed Schiele that it would not bind Metzger and was worthless.

He made no suggestions that it should be corrected, nor did he make any offer to pay any money upon this valueless document.

Certainly something of the kind would be expected from a man who thus estimated a paper which was to be the basis for a $36,000 obligation against himself. His declaration and his actions are consistent with the idea that the contract concerned Schiele only and that he was not interested in the matter. There was no memorandum whatever in writing between Schiele and Bernhardt. Nor was any money paid or tendered by the latter to the former until March 31, 1887, and after it was known that Schiele had made a very advantageous sale of this tract. Bernhardt then tendered Schiele half the amount payable to Metzger, which tender was declined and deed refused.

The statute of this State declares, "No agreement for the sale of real property or of an interest therein is valid unless the same or some note or memorandum thereof be in writing subscribed by the party charged therewith." (Section 1,741, Civil Code.)

The exceptions to this rule are when there has been a part performance, or a resulting trust created by the party asserting the trust having paid the purchase money.

Both the rule and exceptions have been explained and applied in very many cases in our own Supreme Court. Says the Court, in declaring what must be the conduct of the party seeking this relief, and the evidence by which it must be established: "The party must show himself prompt and ready to perform all that is required upon his part. Any hesitation or delay will be fatal to his claim." (Henderson vs. Hicks, 58 Cal., 370; Green vs. Coveland, 10 Cal., 238.) "He must prove a case free from all doubt or suspicion, must establish the facts on which he relies clearly and satisfactorily." (Wells vs. Marshall, 19 Cal., 460; Brown vs. Coveland, 6 Cal., 572.) "The tender of proof is upon the plaintiff; in such a case he is to bring himself clearly within the intentions of the statutes." (Blum vs. Noteston, 24 Cal., 14; Forester vs. Flores, 64 Cal., 26.)

This is the rule inflexibly applied in such cases. The case at bar certainly does not call for any relaxation of it. All these parties were dealing with this property solely as a matter of speculation. They were not able, nor did they propose, to keep it, but to sell in order to make the payments to Metzger.

The amount required was no inconsiderable sum in itself to these parties, situated as they were. It represented a very large investment, sufficient, had the speculation miscarried, to have very seriously discommoded them. It was the part certainly of prudence and caution, perhaps of wisdom, for Bernhardt to hesitate about embarking in it; but he cannot have at once the advantage which prudence and caution secure, and the profits which the boldness or recklessness of another acquire.

Thus this rule for all reasons and circumstances is especially applicable when speculation is rife, and values rapidly and largely fluctuate.

It is further insisted in this case that there was an agreement that these parties should be jointly interested in this adventure, and that this, though parol, may be enforced. This position becomes unimportant in view of the consequences which I deduce from Bernhardt's failure to respond to Schiele's demand of January 31st. I do not think the position asserted tenable (Roberts vs. Ware, 40 Cal., 638), and principles as well are against it. Agency can be predicated of any inchoate illy understood transaction, and if from that, though entirely in parol, interests in land can be successfully asserted, the statute is substantially abrogated.

Another objection is not without significance—so much of the arrangement between these parties as precedes January 31st included Koch as one of the parties. His positive withdrawal presented a very different condition of affairs. While Schiele might have been willing to assume the very liability secured by this transaction with Koch associated with him, he might not be equally willing when Koch withdrew.

Bernhardt might have had the same objections. It should be very clearly established that those parties acquiesced in this changed condition of affairs, a change by which one of the parties to the original negotiation was withdrawn, and the liability of one of those remaining was to be doubled.

Applying the doctrine of the cases above quoted, and plaintiff brings himself within none of these requirements, and he was not prompt and earnest when informed of the final terms of Metzger.

The burden of establishing clearly and satisfactorily the facts essential to his recovery he has not met, but the preponderance of proof stands against him.

He has not shown himself entitled to the relief asked, and the judgment is that he take nothing by his bill, and that defendant go hence with his costs.

MORSE vs. CHAPMAN.

DECISION RENDERED AUGUST, 1887.

Defendant demurs and assigns as follows :

First.—That the complaint does not state facts sufficient to constitute a cause of action.

Second.—That it does not appear during what period of time the defendant was absent from the State.

Upon the ground first assigned the demurrer is overruled.

As to the second, plaintiff sues upon a cause of action consisting of successive monthly breaches of a contract, commencing with the month of December, 1877, and continuing to the date of filing this complaint, May, 1887.

Unless some fact exists which has arrested the Statute of Limitations, much of this must be barred.

This the pleader recognizes, and seeks to avoid the effect of the statute by averring : "And said plaintiff is informed and believes, and on such information and belief avers the fact to be, that said defendant has been absent from and out of the State of California since March, 1878, for long periods of time, amounting in all to about five years."

These monthly payments, founded as they are upon an instrument in writing, are barred in four years from the time they respectively became due, and as this appears from the contract, the pleader was required to avoid this apparent bar. He seems to have so understood by the averment above quoted, and it was so held in Bass vs. Renz, 51 Cal., 265.

That which it is necessary to open at all it is requisite to open with reasonable precision, to so set it forth that the legal result relied upon shall appear with reasonable certainty.

From 1878, the date of the alleged breach, to 1887, when this action is brought, is nine years, of which period the pleader alleges defendant was absent from the State five years without designating the period.

This term thus stated may embrace very different periods, and carry with this possibility very different legal consequences, as each month's breach is barred at the expiration of four years when the defendant is in the State ; and as the statute must be applied to each of these installments, it becomes important to prove, and therefore to plead, whether this five years' absence dates back from May, 1887, or forward from March, 1878.

The further statement of the pleader seems to indicate that this period is made up of several absences. The manner in which these shall be placed may present some difficulty both as to proof and mode of setting it forth. That they are to be aggregated as of some time is the rule, however, in this State. In this case it would probably have to be aggregated as to each of the installments sued for. (Noyes vs. Hatch, 44 Cal., 281.)

The demurrer upon the second ground assigned is sustained.

Ten days to plaintiff to amend.

KELLY VS. CAHALAN.

DECISION RENDERED AUGUST, 1887.

The defendant, by the general denial of his answer, denies the existence of any co-partnership between himself and the testator, Michael Cahalan, deceased.

He further pleads the several sections of the Statute of Limitations in bar of plaintiff's action, and further, the order made by the Probate Court of Santa Clara County, August 7th, 1875, approving his final account as executor, and ordering that said administration be closed.

Had this account or any of the intermediate reports by the executor undertaken to account as to these partnership transactions I should have been disposed to hold that the order of the Probate Court dealing with a transaction thus brought before it was final and conclusive. (Williams vs. Price, 11 Cal., 213; Kingsley vs. Miller, 45 Cal., 95.)

Such is not the case. This report entirely ignores any such relation, as the present answer denies it.

With the fact of a partnership thus brought in issue—with the consequent right of accounting—the Probate Court did not have the machinery for dealing. "The Probate Court has jurisdiction to settle the estate of a deceased person, and has no power save in excepted instances to determine disputes between the heirs or representatives of the deceased and third persons. * * * * The Probate Court can only order the remaining partners to tender the account. But in such a case, if the account is not satisfactory, the executrix or administrator may maintain against the surviving partner any action which the decedent could maintain. * * * * If instead of treating the partnership as dissolved by the death of a member, and proceeding with all reasonable diligence to settle the partnership affairs, the surviving partner continued the business with the partnership funds and estate, he will be held to account for all profits made after as well as before the death of his partner." (Theller vs. Such, 57 Cal., 459.)

"The claim of a surviving partner against his co-partner does not become absolute until there is a settlement of the partnership affairs, and the statute requiring its presentation within ten months does not commence running till such settlement has been had." (Gleason vs. White, 34 Cal., 259.)

Applying the doctrines of these cases to the present controversy, the defendant has not reported to the Probate Court any partnership transactions, for he denies the relation out of which these must spring.

He is continuing and has continued to deal with the partnership estate and funds as part of a continuing partnership since as before the death of the testator, and he must be held to now account for the same.

This is the only view consistent with the determination had by the Supreme Court in this case and with what was held upon the demurrer.

Let findings be prepared in accordance with this opinion and the account asked for will be taken.

BASSLER vs. HABERLANDT.

DECISION RENDERED OCTOBER, 1887.

Upon the 16th of June, 1886, Mary E. Bassler, by written instrument, leased to the defendants certain premises in the City of San Jose for the term of four years, and at a rental of $300 for the first year, and increasing each year to the end of the term. This rent was payable in monthly installments in advance on the 10th of each month. Upon the 17th of June, 1887, Mary E. Bassler for consideration of love and affection conveyed to Alice Bassler these leased premises. The deed was upon the same day regularly recorded in the county records of Santa Clara County.

The defendants entered into the occupation of the premises leased and made upon the same improvements of a permanent character of the value of $1,025.

Upon the 14th of September, 1887, Mrs. Alice Bassler caused a notice purporting to come from herself and signed by herself only to be served upon these defendants notifying them to pay the sum of $85, then due as rent, and if the sum was not paid within three days after said notice to surrender possession of said leased premises. This notice was served by Mr. Hunt, a real estate agent of San Jose.

Upon the third day after the service of the notice, Saturday evening, August Haberlandt called at the office of Hunt & Co., and stated to the member of the firm then in the office, Edwin Hunt, that he had not been able to raise the whole sum of $85, but that he would have and would pay it on the following Monday morning. The defendant testifies that E. Hunt said that would be all right.

E. Hunt testifies that he replied that he had no authority to extend the time of payment.

After defendant had left the office of Hunt, Mrs. Alice Bassler came to the office and directed Hunt not to accept the money if offered Monday. She also visited the same office on the following Monday, and repeated this direction. Upon the following Monday, September 19th, in the forenoon, the defendant, August Haberlandt, called at the office of Hunt & Co. with the $85 required, and offered to pay the same. E. Hunt refused to receive it, but informed the defendant that Mrs. Alice Bassler was at the law office of J. C. Black, Esq., and that he had better see her. The defendant at once repaired to this office, and there met Mrs. Bassler and Mr. Black. He stated to them that he had come to pay the rent, and was informed that there was $30 more as costs which he would have to pay. The defendant stated that he had only the $85, but that if they would give him a little time he would raise the further sum. Mr. Black informed him that he would not commence suit till 5 o'clock of that day, and Mrs. Bassler and her attorney both refused to receive the $85. The defendant upon the afternoon of the same day went to the residence of Mrs. Bassler. He there met met Mr. Bassler and informed him he had come to pay the rent. Mr. Bassler refused to receive it or to have anything to do with the matter.

Returning from this visit, defendant met Mrs. Bassler upon the road, stopped and informed her that he wished to pay her the rent, and had just been to her house for that purpose. She informed him that he would have to see her lawyer, Mr. Black, and refused to accept it.

At all these interviews, except the one Saturday evening, the 17th, defendant had the $85, and was ready and offered to pay the same. In some instances he produced the money in sight. In no instance was any objection made that there was not $85 ready to be paid, but Mrs. Bassler and her agents at all times refused to receive that amount in satisfaction of the plaintiff's claim.

Upon Monday, the 19th, this complaint was prepared and sworn to, and upon the following day it was filed and summons issued. Mary E. Bassler and Alice Bassler were made plaintiffs and the parties herein named as defendants.

In this complaint plaintiffs asked that they have restitution of the leased premises, and that they recover $85 rent due. They also averred that they were damaged by this non-payment of defendants in the further sum of $300, and they prayed that these last amounts, to wit, $85 and $300, be by the Court trebled, and also that they recover their costs of suit.

That is, for this delay from Saturday evening to Monday morning upon the part of defendants to pay the sum of $85, they shall forfeit an unexpired lease of four years, lose with it improvements of the value of $1,025, be mulcted in the further sum of $1,155 damages and all the costs of suit.

The rule is well established that in actions of this character, harsh and severe as they are, the party invoking a statute and asserting a right of this nature must bring himself strictly within the rule he seeks to invoke; that nothing will be intended or presumed in favor of such a claim. (Opera House vs. Bent, 52 Cal., 472; Pling vs. Fitch, 57 Cal., 192.)

I see nothing in the special circumstances of the present case which call for any relaxation of this rule. The defendant is shown to have been as earnest and anxious to find some one to whom he could pay this rent as the plaintiff was persistent in refusing to accept it. In fact, in the light of the instructions given Saturday evening, and repeated Monday morning, to her agent, "not to receive the money if offered," it would seem as though plaintiff was more desirous of procuring a forfeiture than a payment.

Has she brought herself within that rule of strict compliance which will constrain the Court to impose the harsh and ruinous judgment asked for? In my opinion, she has not.

It may be well questioned why Mary E. Bassler is a proper party plaintiff. She had conveyed all her interest in this property long before the rent accrued, and in her deed there is no reservation of rent due or to become due. Passing that as an objection, perhaps waived, there is no evidence that the defendants when this notice was served knew that Mary E. Bassler had conveyed this property to Alice Bassler. Their lease was from Mary E. alone, and Alice was to them, so far as anything here is shown, an utter stranger. In the notice served upon them there is no intimation that Alice has acquired the interest of Mary. Nor was it shown that Hunt, when he served the notice, made any statement whatever. Upon the case as it stood when this notice was served, September 14th, these defendants had contracted in writing with Mary E. Bassler to pay rent, and upon this day Alice Bassler, not named in any way in this contract, and so far as then appeared a stranger alike to it and to all the parties, notifies the defendant that he must pay this rent to her or suffer serious consequences.

In my opinion, Alice Bassler should have informed the defendant when she made this demand of the right by which she asserted it, and if required, should have produced the proofs of that right, and failing so to do, defendant was justified in regarding her as a mere stranger and intruder.

O'Conner vs. Kelly, 41 Cal., 434, is instructive upon this point. In that "the defendant was the tenant of one Murphy, from whom he had a lease of the premises sought to be recovered, for five years. Before the expiration of the lease Murphy conveyed to plaintiff, who sent his clerk to demand the rent, which being refused, plaintiff commenced ejectment. * * * * Defendant was not informed of the conveyance to plaintiff, nor did he deny the tenancy or set up any claim in himself. He did just what any tenant ought to do when called upon to acknowledge the title of a stranger and pay rent to him. If leases could be forfeited by making a secret assignment of the lease, and on demand made by the assignee without making known the fact of assignment, no tenant would ever be safe. By doing just what appears to be his duty to his landlord he might forfeit his estate."

As I have said, there is no direct proof that defendant at the time this demand was made knew of the sale to Alice Bassler. Is there any from necessary or reasonable implication? It may be suggested that the application of Saturday for further time with the promise to pay on Monday was such recognition.

That may be so, but if it were it could be no more than the acknowledgment as of the time when made. Upon no rule can it be made retroactive to imply knowledge as of some former time, whether that period be three days or three years, *non constat;* but that the defendant may on that very day first have learned of Alice Bassler's purchase.

If it was a recognition of this fact as of the time when it was made, then this action was prematurely brought; for from Saturday till the following Tuesday three full days had not intervened. Has the answer of defendants obviated this difficulty?

The answer admits that there is *now* due plaintiffs the sum of $85, and perhaps may be taken as admitting that demand was made by plaintiffs for the payment. It nowhere admits that Alice Bassler owned any interest in this property or these rents at the time of the demand, or that these defendants had at the time of this demand any knowledge of such right.

The averment of the complaint is that Alice Bassler, since the date of the lease, has acquired by purchase an interest in fee in this property. As the pleader has fixed no date, one is implied—the date of the filing of the complaint.

The plaintiff in this case introduced the record of the deed from Mary E. Bassler to Alice Bassler. This only those seeking to acquire subsequent rights were required to take notice of. (McCabe vs. Gray, 20 Cal., 576.)

With the answer which defendants file in this case they bring into Court $85 and tender the same to plaintiffs as rent due at the commencement of this action. For this amount, $85, judgment is ordered in favor of plaintiffs, without costs to either party.

CHAPTER XXII.

JUDGE BELDEN'S health up to the last three years of his life had been most excellent, and his unremitting labor during so many years seemed to have done little more than deepen the inevitable marks of years and render his appearance rather prematurely aged. Latterly, however, slight evidences of heart trouble had manifested themselves, yet they appeared insignificant, and were so considered both by him and his friends.

It was in November, 1887, that the first serious manifestations were noted. On the morning of the 15th, while giving his charge to the jury in the case of Charles Vaughn, charged with assault, he suddenly ceased speaking, and after a few moments' silence, excused himself and lay down, evidently very ill. A few minutes afterward he rallied, completed his charge, and was taken to his home in a carriage. In the afternoon he had improved somewhat, and, in company with Mrs. Belden, started for San Francisco, hoping to derive benefit from rest and a change of climate. While there he suffered several relapses from which he rallied with difficulty, but finally recovered sufficiently to return home to San Jose. From that time his condition remained more or less critical, and though enjoying short periods of comparative comfort, he was quite unable to attend to any of his official duties.

The following months served only to determine the progressive character of the disease, and it finally became apparent that he could not long survive. During the last week of his life pleuro-pneumonia developed and thereby rendered futile all remedial measures.

On the night of the 14th of May, 1888, after several days of constant and severe suffering, he calmly and peacefully gave up his life.

The news of Judge Belden's death, though not wholly unexpected, created a profound impression throughout the community, while from numberless places far beyond the boundaries of California came expressions of grief and condolence. At a special meeting of the Bar on the day following, Mr. T. H. Laine arose and said:

> May it please your Honor,—At the request of some of the brethren of the Bar, it becomes my melancholy duty to announce to the Court formally what has already been announced to the community, the death of his Honor David Belden, a member of this honorable Court. We are reminded by his death that there is another broken column in our temple; a man in the very midst of his career, crowned with wreaths that have been woven by the people for him, has been stricken down in our midst. It is well for us to pause and drop at least a tear at his grave to honor him: we have done all that we could do. He has borne in this temple and elsewhere the honor of his neighbors, the honor of his country; we cannot honor him any further than we have already done, but this is a melancholy reminder that all things must fade, the brightest crowns must perish and all there is of honor must at last pass away. It is well that we ourselves take a reminder of these things.
>
> To speak in his behalf were the waste of words. There is nothing that I could say that would add to his already extended fame, but as a member of his judicial household, as one who

has long walked with him in his career of usefulness in the courts, I feel it a melancholy duty to bear testimony to his standing, to his distinguished abilities. His splendid talents were the gifts of his Maker, but the use he has made of them is his own, and that use has been fitting his great powers; the judicious use that he has made of his powers is the thing that bears him honor; this has and does touch every member of his household here assembled. There has been no summoned convocation of the members of the Bar here; they are not brought together by any proclamation further than the sad tidings coming to each heart; by a voluntary motion they are here assembled to be at the place where it is proper that mention of him publicly should be made, among the men with whom he has so long and well served.

I remember well the first thing that called my attention to his Honor; it was a thing simple in itself, but which speaks well for the man; that was the simplicity of his manners, the simplicity and clearness of his ideas, the simplicity of his action. Nothing more impressed me in his life than that one single thing, and so far as my walk has been among men of distinction I have found it a distinguishing feature that the man of real greatness is easy to approach, his heart naturally flows out to his fellow man; it is the mock prince, the mock sovereign, the dude and the squirt that is hard to approach, that you have to pass through many doors before you can reach their highnesses. In this particular our distinguished brother was singularly gifted, and he won hearts at their approach to him.

And now, may it please the Court, in behalf of the members of the Bar here present, I would ask your Honor to adjourn this Court to such time as in your judgment is fitting to the occasion, and that your Honor appoint and select from the elder members of the Bar such committees as may confer with the family and friends and offer the services of the members of the Bar in so far as they can in the matter of his funeral and interment render assistance or do him honor.

Judge Spencer impressively responded:—The sad news of the bereavement that has fallen upon the Bar and Bench of this county, although sudden, cannot be said to be entirely unexpected. We have been waiting and watching for the recovery of my brother and associate even when it was hardly to be expected; we have hoped when it was hoping against hope. As expressed by my brother Laine, it would be worse than superfluous to indulge in words of praise of the noble qualities of my respected and beloved associate whom we all knew so well.

It can hardly be expected of me on this occasion to express myself further; it would scarcely be expected, independent of any other consideration, that his surviving associate, with whom he has conferred and consulted and been on the most intimate terms that joint judicial labors could make, should be prepared, even if decorum and propriety should permit, to proceed with the duties of a dismembered Court.

In view of all these considerations, and at the suggestion of my brother Laine in behalf of the Bar, out of respect to the memory of my respected associate, one who has presided in its principal department ever since its organization, and one who was clothed with the judicial ermine under a previous organization, we will take an adjournment of this Court for the remainder of the week.

The Committee on Resolutions presented the following testimonial:

Whereas, it has pleased the ever-wise and merciful Author of Justice to remove from our midst and from the scene of his earthly labors the Honorable David Belden, Judge of the Superior Court of the County of Santa Clara, State of California; and

Whereas, in his death the judicial system of Santa Clara County has suffered its most sad and serious loss since the date of its first organization; and

Whereas, the whole community, of which Judge Belden was for many years a useful and beloved member, unites with the Bar in sincere grief about his bier; and

Whereas, it is fitting that to the public record of his eminent services as a judicial officer there should be appended the seal of a merited recognition by the Court over which he long presided with dignity, learning and honor; be it therefore

Resolved, that in the untimely death of the Honorable David Belden the Bench and Bar of Santa Clara County have lost a most able, reliable, just and respected member; the State of California a most useful, illustrious and conscientious jurist; the community a rare example of true greatness and virtue.

That as a Judge of the Twentieth Judicial District of the State of California from 1871 until 1880 and of the Superior Court of Santa Clara County from 1880 to the date of his death, he ever wore the stainless ermine of judicial integrity; displaying in his opinions and rulings a quick perception of the principles of justice, and a deep and discriminating study of the precedents and precepts of law applicable to every case, bearing himself always with a lofty impartiality toward the parties and the interests involved. In his administration of the penal statutes to offenders brought before the Court he was ever moved with an earnest and untiring desire to temper the severity of the sentence with that degree of mercy required by each individual case, to foster and encourage every impulse toward virtue concealed in the criminal's heart. In his bearing toward the Bar he was distinguished for the graceful and uniform courtesy accorded every member, and especially noted for the kindly encouragement which constantly flowed toward the young men of the profession, qualities which won for him the esteem and veneration of the former and the confidence and love of the latter, an esteem, veneration, confidence and love which cease not at his grave, but which will continue to make fragrant his memory through the years to come.

That as a citizen, sprung from the ranks of the masses, and rising through a lifetime of labor by native force of character to an eminence of distinguished usefulness, his career compels the admiration of all classes of society, and should especially excite the young men of our Coast to an imitation of the virtues of his public and private life. In the shaping of public affairs, his advice was always easy of access, and ever found well considered and wise. No member of society was more sensitive to the pulsations of public opinion or more apt in appreciation of public needs. Never forward in the impression of his personality upon the current of affairs, he was never backward in meeting the emergencies of any occasion with a fortitude born of his convictions of right. With broad intellectuality, with brilliant literary ability, with incessant zeal, he investigated every problem of life, and scattered his conclusions broadcast with a tongue of silver and a pen of fire.

That though his loss to the community is lamented as a Judge of transcendent ability and a citizen of distinguished usefulness, it is as a man among men that the death of David Belden is most keenly felt and most sincerely deplored. The friend, the brother, the counsellor, the very model of all the social virtues, he lived out with consistent purity his simple and noble existence, and is gone in answer to the morning call of immortality. Beside the unstained robes of his public service may be laid the equally immaculate garments of his private life.

To the widow of our departed friend and brother who through the well-filled years of a noble life has been the partner of his joys and griefs, the Bar of Santa Clara County extends the comfort of the heartfelt sympathy of its every member; in token whereof, be it

Resolved, that as a body the Bar attend the funeral and sepulture of her beloved companion.

That as a mark of respect to the memory of their late occupant, the Judicial Chair and Bench of Department No. 1 of the Superior Court of this county be draped in mourning for the space of twenty days.

That these resolutions be offered before the Superior Court of Santa Clara County at the next sitting thereof, with the request that they be spread upon the minutes of said Court; that a certified copy of the same and of the further action of the Court be by the Clerk thereof transmitted to the widow and family of the deceased, and that due publication of these resolutions be made upon the pages of the public press.

Respectfully submitted,
John E. Richards,
D. W. Herrington,
S. A. Barker,
A. W. Crandall,
Charles F. Wilcox,
Committee on Resolutions.

J. C. Black arose and said:—I move the adoption of the resolutions just read, and I would simply add as an individual that truly, as the resolutions state, the Bar of this county and the people of this county and this State have lost one of its most brilliant members. Judge Belden was District Judge of the Twentieth Judicial District for this county immediately after my qualification as District Attorney of this county, and I was brought in 1872 and 1873 in very close relations with the District Judge officially, and I can say, as every other member of this Bar can say, that his advice to young men of the profession was always most generous and of most easy attainment and most beneficial; that his mind as a judicial officer was tempered with the broad views that would prompt him as he always did to investigate every such question and when he came to the conclusion he was firm and yet merciful. As a man he endeared himself to every person who was brought in contact with him; and as a friend he was constant and invaluable; and I can say with the other members of the Bar that his relations with each and every member were the most pleasant, and that as a judicial officer this County has never lost one more brilliant in his attainments—literary or judicial—or a better Judge. We join with all his friends in deploring the loss, not only to the Bar, but to the community, and I therefore, Mr. Chairman, move the adoption of the resolutions.

S. F. Leib—I wish to add in seconding this motion what I think is proper for each member of the Bar to do—his personal testimony of his appreciation of the worth and character of the great dead. Judge David Belden was a man among men; his like is rarely found; broad, comprehensive, intellectual, impartial, great in every department and in every respect in life. But of his greatness, of which we are all so well aware, I do not desire to speak so much as of his lovable character. We nearly all of us have known the love of a friend, the love of a brother, the love of a father, but Judge Belden was to each of us all of these, a friend, brother, father. We reverenced him as a father; we went to him for advice upon almost any matter that came up, and we never applied to him in vain. I shall always esteem my acquaintance with Judge Belden as one of the brightest spots in my memory. Therefore it is with the greatest pleasure, though melancholy indeed, that I add my personal testimony to his moral worth and character, as a man whose greatness of mind was equalled only by the sweetness and kindness of his heart.

J. H. Campbell—It is not only to the senior members of the Bar, but to those who began to practise since the time the honored dead assumed the ermine, that the memory of Judge Belden is especially dear, and, as representing that portion of the Bar, I desire to express, in some degree, the affection that is felt for him by all those who have enjoyed the benefit of his kindly suggestions and warm-hearted encouragement to those who have newly commenced the practice of the law, and to that middle class who have practised for many years but commenced their experience as lawyers while Judge Belden occupied the Bench; by those especially his name and memory must always be regarded with the deepest and most grateful affection. He was one of those who did not look with unkindness upon the efforts of those who were striving to attain a position in their profession, but with kindly hand, always readily extended, he helped them upon their way. I know that there is not one lawyer who commenced his practice at the Bar where Judge Belden presided who has not felt his kindly sympathy and encouragement. How often have we seen some young man, struggling over a matter that perhaps was difficult for him to understand, put upon the right path and helped by the timely suggestion toward the end of which he was aiming? Who has not felt the great assistance from time to time which was given by a word of encouragement, of kindly sympathy, from the presiding Judge? In this particular, above all others, was this great man pre-eminent. He was a man of genius whose simplicity was like that of a child, who was always accessible; he was ready of approach, and yet one of those who was a giant intellectually as he was physically; a man of wonderful and magnificent diction, whose tongue was always, as the resolutions put it, a tongue of silver, and he had that ready power of mind which is never surprised, which is always equal to the occasion, which rises as the exigency of the time arises, and who, under all circumstances and in all conditions, must of a necessity be a prince among men; he was a man who would have shown in any position, who would have honored any calling or any situation; and when such a man falls, the community suffers a loss from which it can only gradually recover. [At this point the speaker's eyes suffused with tears and it was some minutes before he could proceed.] Your Honor will pardon me for this show of emotion, but my own personal relations with the honored dead were of such a close and intimate character that I cannot think of him and prevent my feelings from unmanning me. I think, if your Honor please, that it is but fitting that the members of the Bar should show fully their appreciation of the loss which the Bar of this county, the community generally, the Bar of the State, and the State Judiciary, especially, have suffered in the loss of Judge Belden. He was a man who had rendered distinguished services as a representative of the people, a man of great and distinguished mind, who could and did give great service to his State, and to society, in whatever capacity he was called upon to discharge a duty, or fulfill obligations. Under those circumstances it is but right, it is but fitting, it is but the just due of the deceased, that the members of the Bar should express their sympathy with his family, and their appreciation of his services, and the loss that the community has sustained in his death.

Hon. John Reynolds—I had not intended to express my feelings as to the sad occasion that brings us together now until the resolutions were presented to the Court over which our distinguished brother had so long and so ably presided, but I find that I am obliged to be absent on Monday morning when the Court convenes, and I would not feel that I did justice to myself if I allowed this opportunity to pass without contributing my own testimony to the worth and esteem in which I held the distinguished Judge whose memory we have met to honor.

My acquaintance with Judge Belden commenced a short time previous to my residence in this county. I have been brought in contact with him as a practitioner at this Bar from the time he assumed the duties of the office of District Judge of the Twentieth Judicial District, and I have ever known him as a gentleman of kind heart and genial manner, dignified as a Judge, and approachable as a man; he was kind, possessing that one quality that is most desirable in a Judge, of tempering the antagonisms that necessarily arise among the members of the Bar in practice. He was especially apt in that direction. The very practice of our profession leads us to antagonism, the fidelity to a case causes antagonisms sometimes that seem to be personal; and in the absence of a Bar Association, that brings us often in contact and so removes these antagonisms, the disposition and manners of Judge Belden tended very largely to temper and remove them and bring about good feeling among the members of the Bar, notwithstanding the antagonisms that are necessarily engendered; and now, in the presence of the event that makes us all sad, it is a mournful pleasure to testify to the qualities of the distinguished man who was dear to us all. I know that nothing I can say will add in the least to the appreciation, love and admiration that all have for Judge Belden, but in justice to myself, and more in response to my own feelings than with any idea that anything I may say would add in the least to the lustre of the character and ability of the distinguished services of our brother and friend, I offer this my testimony as an individual member of the Bar, friend, acquaintance and admirer of the excellent qualities of him who has departed from us.

The resolutions were unanimously adopted.

RESOLUTIONS OF THE MONTEREY BAR.

Whereas, it has pleased Almighty God to remove from his place among us Hon. David Belden, late Judge of the Superior Court of the County of Santa Clara, California, and formerly Judge of the Twentieth Judicial District of the State of California, of which Monterey County was a part; and

Whereas, the Bar of Monterey County not only feels that it has suffered a personal loss, but that the Judiciary of the State has lost an able and conscientious Judge, society a genial companion and a generous friend, and government a good and upright citizen; therefore be it

Resolved, that we hereby tender our heartfelt sympathy to his beloved wife in her great bereavement, and request that this resolution be spread upon the minutes of this Court and a copy thereof, bearing the Seal of this Court, be forwarded to his grief-stricken widow.

H. F. Morehouse,
Truman Beeman,
Hiram D. Tuttle,
James A. Wall,
Committee.

By the Court,—While the occasion that has called for the presentation of the memorial is a sad one, particularly so to me, it gives me great pleasure to have so fitting a testimonial to the character and worth of my late friend Judge Belden spread upon the minutes. My personal acquaintance with the deceased commenced in this county in 1874, when he was our District Judge, and has increased in intimacy up to his death. I have ever found him a kind, considerate and obliging friend, a true man and an able jurist. It is fitting that we who have known him so long and well should in our feeble way erect a monument to his memory, and make a record that will assist in handing his name down to posterity as an example worthy of imitation.

The funeral services, which were held May 17th, at his late residence, were of a most impressive character. After a hymn had been sung by the quartette in attendance, Judge Niles Searles stepped forward and, addressing the members of the Bar and the others who were present, said:

Friends and Citizens:—We come with bowed heads and bleeding hearts to perform the last sad rites over our departed friend. If there is aught on earth that can teach us a lesson of humility and demonstrate our weakness in the sight of Heaven it is the solemn spectacle before us. We cast our images upon the mirror of time and flit away; like the vapors of morning we disappear. Man that is born of woman is of few days and full of trouble. Whence he cometh and whither he goeth no man knows. To our finite wisdom it is not given to rend the vail which hides the future. Our lives furnish the factors in the problem, and through faith alone can we solve it.

There is one consoling reflection. We make the factors, and should we err in our conclusions, "He who doeth all things well" will make no mistakes in reaching a correct result.

The inherent love of justice which reigns in every heart commands our assent to the proposition, and at the same time prompts us to lead such pure and noble lives that when called to our fathers, our judgment roll shall be without error.

David Belden was born at Newtown, in the State of Connecticut, August 14, 1832, and was a typical New Englander. He is said to have been of Welsh descent. If so, I congratulate every son of Wales in the land upon his kinship to the noble dead. His father was a member of the legal profession, and, as I am advised, was a man of strong intellect, great firmness of character and unimpeachable integrity.

To him was he indebted for the adamantine qualities in his composition which stood out like yonder Mount Hamilton—fit foundation and receptacle for scientific thought and research.

From his mother he inherited the brilliant qualities we all so much admired, and which, like a calcium light, illumined every subject he grasped.

He was educated in the common schools of his native town, or rather he there received the germs of an education which was continued to the day of his death, and which culminated in the accumulation of a vast storehouse of learning, from which he was wont to draw as occasion required, and which demonstrated his thorough knowledge of most branches of modern science.

He learned the use of tools and was a fair mechanic. Had his hands worked as deftly as his brain he would have built temples of strength and beauty all over the land.

He came to California in 1853 and settled at Marysville, where he read law, and in 1855 went to Nevada City, where he engaged in the practice of his profession. It was here that he first exhibited the unfolding powers which later development have proved to be nearly allied to genius. His power of analysis was thorough and almost complete. He could separate the chaff from the wheat. He reasoned logically, and his aptitude in ridicule drove many an opponent discomfited from the field.

His command of language was phenomenal, and to this gift he owed some of his most brilliant victories.

In 1858 he was elected to the office of County Judge of Nevada County, and for four years served as such with marked ability. In 1861 he was married to Miss Elizabeth Farrel, who survives him. His married life was a poem, adorned by the gems of mutual trust, love and affection. In 1864 he was elected to the State Senate, where his commanding talent, his readiness in debate and his wisdom in counsel, secured to him a leading position. At the conclusion of his term he traveled with his wife for some months in Europe, gathering from every land he visited practical hints, which have served as texts for many sermons embodying profound thought and practical wisdom.

Upon his return he left his mountain home, the scene of his early labors and triumphs, and took up his abode in this fair land of flowers.

How he has wrought among you; how he has entwined himself in your affections; how you have honored him, and how faithfully he has discharged the trust you have confided to him, you know full well and I must not say. This gathering host, these solemn faces, with all the evidence of grief which surrounds us, are more eloquent than words in illustration of your esteem for our departed friend.

Judge Belden was a self-made man. It is sometimes said such men are never quite finished. In his case the foundation was laid broad and deep, an intellectual temple of vast proportions and magnificent in design was erected, whose dome towered above his fellow-men, and whose interior walls were decorated with wisdom, justice, temperance, love.

If aught was wanting, it was the lack of paint and varnish upon the outer walls.

He was just, and we respected him. He was intellectually great, and we admired him. He was a true friend and we loved him, and those of us who knew him best, loved him most.

Had he lived, other achievements had been his; other and higher honors awaited him. He is gone. The sunlight of his intellect is obscured by the clouds of death. The inspiration of his presence must be for evermore a memory. He is gone, but the example of his life will not be lost. The struggles of his early life, the unaided achievements of his early manhood, the triumphs of his after years, his unswerving love of justice, the purity of his private life, the poetry of his attachment for the wife he loved, the reverence with which he viewed and upheld the domestic relations, constitute him a fit exemplar for the rising generation.

To us, who were admitted to his inner consciousness, who were the recipients of his friendship, who had witnessed his growth and expansion, who knew the depth and breadth of the current of his life, its volume and flow, who were inspirited by his ready wit, thrilled by his eloquence, charmed by the simplicity of his unostentatious manners, who were, in short, his devoted and sincere friends, with all that the term imports, there remains a sorrow so deep and all-pervading that we may not speak.

To the devoted wife, whose love was the proudest achievement of his life, whose companionship was the day-star of his career, who knew and appreciated him for what he was, no words of ours can bring consolation. To console her seems profane. We bow with reverential awe before her overwhelming sorrow, and, conscious of the utter impotence of all earthly advice, can only humbly pray Heaven for the consolation which is not of this earth. Reverently we lay our dear friend in the house appointed for all the earth, and as we do so, we repeat the first words that flashed through the mind at the announcement of his death: "The State loses a great man; his family a devoted husband; and I, my dearest friend."

The funeral procession, over a mile in length, as it moved slowly along through the streets of the city and towards its destination, presented an imposing spectacle. In addition to the relatives and intimate friends who followed the remains to their final resting-place, were the City and County officials, the members of the Santa Clara Bar, eminent representatives of the profession from San Francisco and from many counties of the State and various local organizations.

The whole City of San Jose wore at this hour an aspect of sadness. All traffic was for the time suspended. The principal places of business were closed. The Court-House was draped in mourning. Flags on the public and private buildings were placed at half-mast, and everyone seemed impressed by the solemnity of the occasion.

The closing ceremonies at the grave included a brief but eloquent address by Hon. T. H. Laine, who said:

> Once more, dear friends, we stand in the vicinity of an open grave, where we are assembled in the presence of a city peopled by the dead. We all stand here as brothers, to perform the last sad rites for one who was revered by you all. We stand by a city near the Ocean of Death, where alike the mighty and the powerless, the known and the unknown, have all to be submerged in its dark waters, until such time as the Lord God shall be pleased to lift the fog that overhangs the hereafter. It reminds us that here at last we must part from all that is dear, noble and great.
>
> While, my brethren of the Bench and Bar, it is customary for the soldier to fire a farewell salute over the grave of his dead comrade, it is our duty to bid a solemn adieu to our departed brother, for long has he held the seals of power in hand, and well has he served his native land. Simple as a child, pure in his domestic life as a woman, bright and sure as a statesman, in his genius wise and learned as a judge, he has died in the splendor of his manifold good works, after having been the carver of his own fame and manhood. So well has he carried out all his undertakings as to make us proud indeed of being members of the same profession with him. But for him now life is past and his labors are over, so we will put him to sleep with all his honors upon him, and we must console ourselves for his loss by thinking of his well-spent life.
>
> For his bereaved consort we cannot express too much sympathy, and in our feeble way we can only commend her to our Heavenly Father, who watcheth over the widow and the orphan.

One of the last wishes of Judge Belden being that his old friends should fill in his grave when they laid him to rest, Mayor Boring, Hon. T. H. Laine, Hon. Niles Searles and Hon. T. B. McFarlane stepped one to each corner of the grave and, taking a spade, proceeded to gratify the last wish of their old friend, and were followed by a great many others until the work was completed.

Flowers in rich profusion were placed by loving hands upon the new-made mound of earth, and thus the solemn rites were ended and the mourning friends dispersed, deeply impressed with a ceremony the like of which had never before been witnessed in the City of San Jose.

On the morning of May 22nd, immediately upon the opening of the Court, Mr. J. E. Richards arose and said:

> At the assembling of this Court on last Wednesday morning the sad intelligence of the decease of your honored associate, Judge Belden, was officially presented. Upon the suggestion of the Court then made the members of the Bar of Santa Clara County met and declared their sorrow at his decease; they decided to attend his funeral as a body. They passed from these judgment halls to that other temple of domestic virtue, his home; each member of the Bar there gazed in turn upon the form and face of their beloved friend, and looked for the last time upon that tenantless body and brow to which his mighty spirit had given so much of power. With

slow and solemn step we went from his home to his sepulchre; into his open grave we poured the libation of our respect to his honor and his greatness, and on the clods our hands heaped up we laid the flowers he had loved, emblems at once of our sorrow and of our hope; we have retraced our steps from his tomb to the presence of his judgment seat to offer our final and all too feeble tribute to his worth. On behalf of the Bar I present to the Court this morning the resolutions which your Honor directed, which your committee has prepared, and which the Bar have unanimously adopted. And I move, your Honor, that these resolutions be spread upon the minutes of the Court.

Hon. L. Archer—If your Honor please, I rise to second the motion made by my brother Richards, and I avail of this opportunity to say a word or two in relation to the lamented Judge who is dead, for the reason that I have not had a favorable opportunity to add my tribute to his merit and worth.

Certainly it would be like a thrice-told tale at this time to undertake to enumerate his excellences and comment upon them, or to express in full the sympathy and sorrow that we feel upon this sad occasion. His praises have been in the mouths of thousands of the citizens of California the past week. The high esteem in which he was held was shown by the manifestation made without ostentation on the day of his funeral.

We have heard the expression from the younger members of the Bar in regard to his high, consolatory, patronizing bearing towards them, and the helpful hand that he had so often extended and the encouraging words that he so often uttered toward them in their first struggles in the profession; we have heard from the older members of the Bar how he has held the reins evenly between them, how, when actuated by perhaps excess of zeal in the cause of our clients, he has thrown oil upon the troubled waters and has calmed the angry feelings of the members of the Bar; and how he has never during his life used the power that he had on that Bench for the purpose of punishing or wounding the highest or the humblest of the profession. We have heard all these things, but there are two features of Judge Belden's character that I desire to commemorate in the remarks that I make: As a citizen he was outspoken; he was firm, positive, unmistakable in his views and his positions, and, as a matter of course, considering the many subjects that have been under consideration during his active life, he has found many who have differed from him, but the crowning feature of his character was, he always commanded the confidence of those who agreed with him, and also commanded the respect of those who were opposed. As a Judge upon the Bench, whether right or wrong, his rulings were clear, distinct and unmistakable; they were consistent from one end of the case to the other. I have yet to hear, if ever it shall be heard by human ears, that he ever refused to grant a fair, full and complete bill of exceptions or to sign and certify a truthful and complete statement on motion for a new trial or an appeal to the Supreme Court, and these are features that raise him as a man and raise him as a Judge high in the estimation of just-minded persons. Even if he were not possessed of all other virtues and excellences, he would stand justly upon the pinnacle of fame. And now I will add that it is only a brief time that we have to remain; we must back to busy life again; and I will say to my brother members of the Bar, in the taking off of our beloved Judge, we have an admonition and a lesson. The admonition is that "in life we are in the midst of death;" he was the strongest of us all only a few years ago. He was of an age that ordinarily has not encroached upon such a physical or intellectual system as he had, and yet he has gone before us; an admonition that though

"Leaves have their time to fall, and
Flowers to wither at the north wind's breath;

* * * *

But thou hast all seasons
For thine own, O Death!"

And now the lesson that it teaches us is this, that in the presence of death the angry feelings and contests, if we have had them, are forgotten; if ever there was an unkind thought or an angry feeling, or an unjust action, when one of these parties is still in death, standing upon that great verge which separates the known from the unknown, they are all lulled to quietness, and there is left only the regret that there should ever have been such a feeling. And now, in the presence of this bereavement and this misfortune of ours, my brother attorneys and your Honor, let us remember that we are of one brotherhood; our profession calls us into antagonisms necessarily, but there is no requirement of the profession of law that calls upon any member to perform one single act that shall be ungentlemanly or unkind; let us be more of a brotherhood. Now, in winding up this last season of mourning for the week, we can each one for himself say, in the language of the poet:

"Green be the turf above thee,
Friend of my better days.
None knew thee but to love thee,
None named thee but to praise."

Judge Spencer—My brothers of the Bar of San Jose, in the removal by death of my honored associate, we, in common with his relatives and the community at large, have indeed suffered a great and irreparable loss. I can but ill bring myself to the stern realization of the fact that the relentless Destroyer has taken from my side one who for these eight years has been my co-laborer in the delicate and arduous duties incident to the office of Judge of the Superior Court; one with whom I have oft held instructive and pleasant consultations, and with whom I have maintained most intimate and cordial personal relations.

I knew him well, and thus knowing, I can truly say that his virtues were many and noble, his faults few and insignificant.

Indefatigable and conscientious in the attention to and performance of his judicial duties, he was stricken while in the midst of his labors. With Spartan courage and steadfast devotion to duty inherited from his Puritan ancestors, for nearly three years did he battle with death and stand by his post with unswerving fortitude, attending to every duty of his office.

To the oft-repeated solicitations of friends to give himself relaxation and rest has he as often responded from the fullness of his convictions of duty, "I would rather wear out than rust out." And most truly did he wear out in the performance of his judicial duties, for not until the overtaxed body and weakened vital organs had broken out in open rebellion did he yield to the inevitable, and was carried out of the temple of Justice which he had adorned as District and Superior Judge for sixteen years, to linger by the dark river until the ferryman should come to transport him to a haven of well-earned rest.

Judge Belden was at the time of his death 55 years and 9 months of age, and had served with distinction and honor in the several judicial positions of County Judge of Nevada County, District Judge of the Twentieth Judicial District, and Superior Judge of this county for the collective period of twenty years.

Not only was he an able expounder of the law, but the citizens of his former mountain home had delighted in sending him to the halls of legislation, where, as a Senator, he distinguished himself as an able law-maker and a leader among his fellows.

He was a truly remarkable man. Many have gone before him whose legal attainments have been equal to his. Others may have equally possessed the treasure of masterly eloquence. But it has never been my fortune to find combined in any other person so many rare and glowing qualities of heart, brain and personal accomplishments.

As an orator it has been truly said of him that "he spoke with a tongue of silver"; his command of language was wonderful, his selections beautiful and most happy. He was wont at times with his bursts of eloquence to hold his listeners delighted and entranced. Although his delivery was rapid, he never hesitated for an apt word or sentence. "His words came skipping rank and file almost before he would."

As a jurist he had few superiors. Well grounded in the elements of law and conversant with the mass of judicial precedents, he added that ready perception of principles applicable to any given set of facts and that peculiarly incisive power of reasoning that make the true lawyer.

But his attainments by no means stopped with those of his chosen profession. His researches in the general domain of knowledge included almost every branch of science, art, history and political economy.

Although not a specialist in any one department, he was at home as well when gazing at the gems of night figuring their parallax and discussing the laws of planetary motion as when calculating the angle of aperture of an object-glass or studying the phenomena of the border line of life exhibited in the amœbæ.

But as a Judge did his fitting qualities shine forth with undimmed luster.

He was a just Judge, a wise interpreter of the law and evidence, and withal simple and unassuming in manner and sympathetic almost to a fault.

He has passed from our midst forever. The chair that he was wont to fill with so much dignity, honor and credit is now vacant. His robes of office have been replaced by the winding sheet. We have laid him away in his final resting-place and have taken to our hearts the solemn and instructive monition that the sad lesson affords.

A loving wife is mourning the loss of a loyal and affectionate husband. The Bar of this county and the profession at large lament the loss of a cherished brother, and the county and State a valued citizen and faithful public servant.

But the memory of his virtues and noble qualities we should ever keep green in our hearts, and it is eminently fitting that the resolutions now presented by his brothers of the Bar should be inscribed upon the pages of the records of the Court which he has caused to be kept so many years.

Let the motion be granted, and an engrossed copy of the resolutions be presented to the bereaved family.

CHAPTER XXIII.

TO properly delineate the character of Judge Belden ; to accurately describe his personal traits and characteristics and to do full justice to his high qualities of heart and mind, are most difficult tasks. The biographer here finds himself embarrassed by that wealth of material which must needs pertain to a life so exalted in its aims and attainments, so varied in its phases and withal so replete with honors. His versatile character and the many sides of his character reflected an ever-changing picture whose general outline remained always the same, but whose individual merits were to be determined from many points of view.

In a contribution to the San Jose *Daily Herald*, a writer says :

> He had a genial, offhand way that sat well upon him. In conversation he was the embodiment of wit and good humor, and he was undoubtedly the best after-dinner speaker on the Coast. Running over with animal spirits, a man of wide observation and extensive reading, thrown from his boyhood upon his own resources, his natural independence and self-reliance were developed all through his life. His mental powers were of a peculiar kind. Such quickness of perception, such rapidity of logical deduction, such marvelously ready command of his knowledge, having almost the color of intuition—these peculiarities he possessed in a remarkable degree and as few men do.
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> As a lawyer he combined the power of close reasoning with incredible quickness at catching a point. As a Judge his rulings during the progress of a trial were given without a moment's hesitation and with matchless clearness and unanswerable logic. As a Senator he was eloquent, convincing and overwhelming, his argument pouring forth in a torrent that nothing could withstand. In charging a jury or in summing up a case his speech was very rapid, his sentences clear and classical, his points covered with the precision, thoroughness and order of the closest logical discussion of a philosophical question.
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> He was a writer too. In writing an opinion his old-fashioned quill pen flew over the paper with astonishing rapidity. With him work seemed pastime. His method was synthetical, the result analytical.
>
> Above all was his modesty. There can be no doubt that this is the only explanation of his not having a world-wide fame. With all these extraordinary mental qualities he combined a personal quality, conventionally termed personal magnetism, which attracted men with a peculiar power. Those qualities, including a capacity of execution rarely seen, fitted him to bear a name that the whole world would know. Across the path to such possible fame stretched a modesty that stood as a wall—maybe also a philosophical indifference. What (he would argue) is the good of fame? To attain it—what? Unwholesome striving, heart-eating ambition, yearnings unsatisfied, hopes mangled and crushed ; in the end a disappointed life—and then the grave. He counselled worthy effort, but not that form of ambition which is purely a manifestation of vanity ; and here he drew a sharp distinction. He had traveled with his wife over Europe and this country. He had read much and thought much ; and out of his wide observation and fecund mind he had brought many writings, which no doubt have been stowed away at home by a loving hand that treasured them. Why did he not publish them ? The writer of this sketch had asked that question several times. "Why publish them?" he would ask in reply. "I don't need the money, and they wouldn't do any good ; and besides, I have read them to my wife, and she seemed pleased with them—I desire no other audience and no greater triumph." Can it be hoped that they may yet see the light ?
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> With young men especially was he popular. Here was the bond of sympathy close and warm. Numberless have been the words of comfort and encouragement that kept a young head

above the water. But here came out another peculiarity. It pained him to see bright young men engrossed by political ambition. He warned them against it sometimes, and has been known to quote Wolsey's famous caution to Cromwell—"I charge thee fling away ambition; by that sin fell the angels." Yet in a political campaign, when his services were wanted by his party, his eloquence on the stump fired many a heart.

In his home relations were seen other qualities as unique as they were attractive. Although he had no children, his love for children was exceedingly tender. A picture abounding in tenderness and pathos is before the writer's memory. It was a year or more ago. A sister of Mrs. Belden was visiting her, and with her was her baby, a wee mite of humanity just clinging to life, pale, sickly, uncertain of existence. Judge Belden took the little sufferer under his own broad wing, and nothing could have been more becoming to manhood than to see this big gray-haired man holding the baby for hours in his great strong arms, and carrying it around the garden and pointing out the bright flowers and telling it all manner of things that it didn't understand a single word of, and with his own hands constructing an ingenious swinging cradle on the front porch, and taking the most elaborate precautions against the intrusion of flies, and doing a thousand such little things that showed a heart full of the milk of human kindness; and when he had nursed the baby back to life and health, and it was taken away by its mother to its home in the south, his grief and loneliness were all too clear to the observant.

It was this spirit that made him the most expert amateur floriculturist in California. The ample grounds surrounding his comfortable home at the corner of Eleventh and San Antonio streets were a marvel of skill in flower-growing. He did much of the actual work himself, and all that others did was done under his personal direction. His knowledge of the peculiarities and idiosyncracies of plants was astonishing. He would speak of them as intelligent creatures, and he could discourse by the hour on the subtleties of cunning, wisdom, or instinct which he had discovered in them. His sight was keen where other men were blind; and he loved his plants as though they were children. His ideas and knowledge of flowers would, if written and published (he may have written much), prove very interesting and instructive.

His mechanical genius was remarkable. He was constantly inventing, devising, or constructing some unique and original mechanical contrivance. He invented and had constructed a book-rack for holding large books open that surpassed in usefulness any of the patented inventions. He made with his own hands an Æolian harp that was correctly tuned and that filled the big house with strange mysterious music. He made a number of most ingenious and sensitive instruments for weather observations, by which he could predict the weather with almost unerring certainty. He was always making these ingenious contrivances for all kinds of uses.

Socially he shone at home. He was in no sense a society man—he loved his home, and he wanted to meet his friends there. From him and also from his wife, a sweet, refined and gentle Christian woman, there was always that cordial welcome which did not have its birth in empty conventional politeness—it was the utterance of two warm and unselfish hearts. It was always a bright cheery house, and there was always warm sunshine all through it, that went into one like good old wine. Old men were there often, but young men and women oftener, and they felt at home too, and loved to go.

Judge Belden had not a single personal vice. He did not know the taste of tobacco, and the first drop of intoxicating liquor of any kind that ever passed his lips was a teaspoonful given him to bring him out of his first desperate attack last November. It was probably not only the first but also the last that he ever tasted.

At heart he was always young. He loved the open air and the sunshine. He would stop and watch a game of marbles by boys and gravely give judicious hints as to the best shot to make. He went annually to the coast on a camping and fishing expedition, and was an expert sailor and fisherman. He likewise possessed remarkable skill as a marksman, though he seldom if ever indulged in hunting.

Having been a tremendous worker himself—having, in short, worn himself out physically by years of hard mental strain—he too late learned the wisdom of taking life easy. In his later years, however, he enjoyed the sweetness and beauty of nature to the full of his inclination, and he begged his friends to do likewise.

Although of so genial, human and sociable a disposition, Judge Belden had never allied himself with any fraternal or benevolent society, excepting the Santa Clara County Pioneers; and even in the work of that organization he took little active part; nor had he allied himself with any religious organization. With the deepest reverence for nature and nature's God, he went his own way, actuated by the highest personal conception of his duty and his obligation; doing good where he could, giving of his store to them that were in need, whether of strong words of hope and cheer or help of what is often considered a more substantial character.

It would be difficult to determine in what department of learning Judge Belden excelled; whether as a jurist, a statesman, or a practical scientist. Even his most intimate friends failed to sound the full depths of his knowledge. Congressmen, Governors, Senators and Judges sought his opinions. Architects and Engineers went to him for suggestions. Presidents of Colleges and Universities solicited his advice. People engaged in the mechanical arts submitted their problems to him for solution. Farmers, fruit growers and viticulturists relied on his endorsement of their methods. The accepted theory in regard to the forces which marked the Pacific Coast with its peculiar topography was formulated by him. He had solved the meteorological phenomena of California so completely that his forecasts of the weather were never disputed. He constructed an instrument so perfect that it accurately registered all the details of an earthquake shock, including the time, direction, duration and distance of vibrations. He had devoted considerable attention to astronomy, and in this science possessed qualifications of a high order. In the causes which led up to the bequest for the Lick Observatory and the subsequent building of the Mt. Hamilton Road he was directly concerned. In his beautiful grounds in San Jose he established experimental gardens where he tested all horticultural novelties, and such as proved valuable he distributed to the people with full instructions as to their propagation. There seemed to be nothing worth knowing within the realm of human attainment that he had not studied and mastered. And with all this he possessed an eloquence so simple, yet so beautiful, that his ordinary conversations on the street, on the simplest of topics, would attract a crowd of delighted auditors. This seemed a natural gift, and was of a peculiar character. He used neither the metaphor, hyperbole, polysyllables, nor gestures of the professional orator. He drew no flower circles around his ideas, but presented them in sentences epigrammatic and in words monosyllabic. There were no synonyms in his vocabulary—each word had its exact meaning, and no other could be substituted without destroying the intent of the expression. With the simplest language he would present the most beautiful sentiments and majestic ideas. Whenever he instructed a jury, delivered an opinion from the Bench, or pronounced sentence on a criminal, his spacious court-room would be crowded with a throng of eager listeners. With all his researches into grave subjects he was possessed of infinite humor which overflowed in every direction.

His habits of life were marked by extreme simplicity, and his intercourse with the people was frank and cordial and without the slightest discrimination in regard to wealth or station. He possessed a benevolent disposition, and his great object in the acquisition of knowledge was that he might be useful. He gave much in charity, devoting a large portion of his income to this purpose. He had no personal ambition or desire for fame. Had it been otherwise, there is scarcely a limit to the eminence he might have attained.

"His career," says a writer in the San Jose *Mercury*, "was like the rounded course of the summer sun, brilliant in its morning beams, affluent in its noonday splendor, genial in its descending radiance, unclouded to the horizon. Even amid the mournful reflections upon his departure there is pleasure in the earnest contemplation of his well-spent life.

"There was something suggestive of heroic about this man, for whom flow the unstinted tears of the people he loved and served through many years. His physical frame was molded to proportions beyond the ordinary. The mind and soul within it partook of its dimensions, and in all their workings bespoke an intellect and heart of gigantic measure. In the performance of his official functions and the exercise of his private impulses there was a majestic simplicity of movement which attracted the notice and awakened the admiration of all. And in his death there appeared an exhibition of lofty courage reaching the sublime. With unclouded mind, with unblunted faculties and with unwavering soul, he walked down to the gateway of death and waited patiently with calm eyes to solve the mysteries and read the truths which lie beyond the grave.

"The record of Judge Belden's useful life displays upon its every page a constant and tireless devotion to the two main motives which impel human action—the desire for justice and the thirst for truth. To the satisfaction of these purposes he devoted the arduous labors of his public service and the intellectual occupation of his private life. A student of men, of books, of systems and of events, he displayed in every field a marvelously quick conception of the just and the true. As a lawyer his fame went abroad beyond the boundaries of his practice as a defender of the persecuted, the friend of the friendless and the uplifter of the oppressed. In his political relations he was the firm ally of the party of liberty, of humanity and of justice to all men of every race. In his private life he was the pattern of domestic virtue, the friend of all struggling spirits and the dispenser of charities to every worthy cause. In all these engagements there was visible the same quiet persistence of purpose to measure out the justice and realize the truth of life in accordance with his powers and to the full limit of his duty.

"The life of this great and good man has been lived to its close, and is ended in its material relation to us and to time. We cannot stand beside the empty temple of his spirit, lying on the brink of the dark river he has so lately crossed, and catch the faintest whisper from the other side. But we cannot help believing, without knowing why, that such a life lives on, and living on, by virtue of eternal justice and eternal truth, achieves the ends to which, in this narrow world, it was lifted in aspiration but in attainment forever clogged."

REFLECTIONS UPON THE LIFE OF THE LATE JUDGE BELDEN.

BY W. S. THORNE, M.D.

As it is difficult to lay upon canvas a faithful likeness of the sunset after it is merged into the mists of twilight, so is it no easy task to portray the form and impress of a great man when the light that irradiated his God-like being has passed beyond the horizon that bounds our ken. As the cold and rigid statue conveys but the mere outline or suggestion of the living form, so our best thoughts and our most eloquent words fail to reproduce a living likeness of the Ego of one who has passed from life into the shadows of the Unknown.

David Belden was a man cast in a large mold. His physique was massive; his head well poised and surmounting a deep, broad chest. His figure was erect and his carriage dignified. His features were prominent but symmetrical. A broad, deep brow beneath which shone grey eyes, now beaming with sympathy, now twinkling with humor, made at all times his presence both pleasing and commanding.

Horace says of the poets: "*Non fit, sed nascitur.*" Why may we not say the same of others? Some men are born to greatness, and the subject of these reflections was one of them.

With his admittance to the practice of law in 1855 began the development of those latent powers of mind that subsequently distinguished him as a lawyer and a Judge. These qualities pre-eminently fitted him for the Bar. He possessed all the attributes of a successful lawyer—quick apprehension, clearness, orderly arrangement, critical analysis and an intuitive knowledge of men and things; to these were added strong individuality and a marvelous fertility of illustration. His extensive erudition enabled him in debate to draw his illustrations from science, politics, literature and art. The kingdoms of Nature yielded their treasures to his magic touch. During the stirring scenes of the civil war Judge Belden acquired a reputation as a political speaker second to none in California. His unswerving fidelity to the cause of our common country, his fervid eloquence, his store of historical data and his fund of humor and anecdote rendered him a power in his party and a terror to his political opponents. In his political relations he exhibited that decided antagonism to trickery and intrigue that gained for him the respect and confidence of all honest men. During the many years that Judge Belden occupied the District and Superior Bench his career was marked by the same stalwart integrity and fidelity to duty that distinguished him at the Bar. There was no chord in his generous nature so responsive as his sympathy. Nothing appeared to delight him more than an opportunity to relieve distress. On one occasion a woman whom I had known in affluent circumstances sent for me. Misfortunes of various kinds had overtaken her. She was now poor and friendless, and latterly had become a victim to intemperance. She was in jail. Whilst intoxicated she had wandered into a shop and had there purloined some article of trifling value. The charges against her were drunkenness and theft. This was her first offence. Her distress was extreme, and she begged me piteously to extricate her from her critical position. I promised to do what could be done for her, and hurried away to Judge Belden with her tale of woe. The Judge took up her cause, obtained a dismissal of the charges against her that very afternoon, and gave her money with which to return to her home some fifty miles away. His friendly aid and counsel were especially extended to the struggling young attorneys of his Court. His exact sense of justice caused him to prevent advantage being taken of their want of experience or technical knowledge. Accurate and painstaking in matters pertaining to his own duties, he was nevertheless generous and forgiving as to the faults of others. Never in my experience have I met a man who so thoroughly and profoundly hated everything that was low, depraved and criminal. This abhorrence of evil was inbred. It was with him an organic instinct. It existed in him purely and with no element of cant or hypocrisy. He did not decry evil while extolling virtue. Pure and orderly life was to him the normal and natural order of society, and his utter detestation of vice gave him no thought as to whether it won or lost him the approval of men.

His manner at the bar was calm and dignified, his bearing temperate, his language choice and frequently brilliant, his ideas clear and forcible, his voice rich, deep and well modulated, and his delivery rapid and unhesitating. When a malicious crime had at last been fixed upon the culprit, he was the cold, stern, inexorable Judge. His denunciation of the crime while passing sentence on the criminal was often terrible. His rich voice rose into billows of fiery eloquence. The Court-room is hushed; silence on every lip, expectancy on every face. "Prisoner at the bar, stand up." Then began the language of the sentence; first, like the low mutterings of the distant tempest, the graphic sketching of the crime—the skilled arrangement of facts that fit one to the other like the parts of a garment. The sentences rise and fall with the measured cadence of the waves upon the seashore, and as the tempest rises, they hurry in more rapid succession. His enunciation quickens as he forges link by link a chain of fearful evidence about the prisoner. The criminal pales and trembles as he realizes his fearful situation. Every heart beats nervously; every eye is strained to catch a glimpse of that central figure that holds at this supreme moment the power of life or death.

In contradistinction with these attributes that rendered Judge Belden a typical exponent of the majesty of the law was his abundant humor. It sparkled and bubbled forth from the depths of his generous nature. In his wit there was nothing ungainly, blunt, or unreasonable. His sallies were tempered by a manner and style of address that robbed them of offense. He possessed a keen sense of the ridiculous. To him every proposition was many-sided, and the serious aspect was but one of them. His comprehensive grasp of every subject that attracted his attention, aided by a lively imagination and ready wit, enabled him to see and enjoy the grotesque and comical in everything.

As a writer he possessed merit of a high order. His style was most winning and his descriptive power remarkable. His opinions and decisions are models of clearness, logical and orderly arrangement, and apt illustration. His diction was at all times easy and graceful, and his imagination susceptible even to the poetic. His mind was unceasingly active, and rested only when at work. Everything was easy to him, and the most intricate problems yielded a ready solution to the light of his versatile genius. The flexibility of his mind permitted him to turn from the most serious and intricate matters to graceful composition or brilliant discourse. In all that he undertook there is the impress of breadth and power. His knowledge was vast and varied, and so exact and well arranged as to enable him to draw from it at will in debate or in argument. His power of narration was also phenomenal. He would often descend from the Bench after adjournment of Court and hold a group of legal friends an hour or so listening to his anecdotes of Bench and Bar, of which he had an inexhaustible fund.

The universe in its magnitude and minitude were to him equally familar and equally interesting. Judge Belden's tastes in the direction of the natural sciences; his acquaintance with astronomy, with meteorology and the theories concerning the earth's formation, was both comprehensive and accurate. It was his fixed intention to have written a work upon the meteorology of the Pacific Coast, and certainly no one was better fitted for the work.

He was an adept in microscopy. This work especially delighted him. He had studied with especial care the minute anatomy of plants and insects, and was skilled in those critical investigations that belong to medico-legal inquiry. The writer has frequently seen him take the cross-examination of a *soi-disant* microscopical expert, to leave him at the end of it a forlorn wreck. In the realm of Nature's earnest workers he was *facile princeps*. He possessed what has not inaptly been termed exuberant intellectual curiosity and self-reliant originality. His sympathy with and love of nature enabled him to realize the poet's ideal of "tongues in trees, books in running brooks, sermons in stones and good in everything." The contemplation of those vast orbs that float in space always excited in his mind a train of philosophical reflections that found their expression in instructive discourse. His mind was marked by a flexibility that opened to him every avenue of human thought. Somewhat of a skeptic in religion, he yet recognized the fact that civil institutions cannot wisely or safely be measured by the tests of pure reason, and that the overthrow of revealed religion was surely calculated to undermine the structure of political government. His respect for the faith of others and his liberality to all creeds entitled him to the peaceful enjoyment of his own convictions. These were positive without offense and confessed without cant. No taint of hypocrisy attaches to his belief; it was honest, and his conclusions had been evoked by the process of his logical mind. If some are guided by the faith that is in them, who shall deny to him having none the guidance afforded by the light of reason? There

was no flaw or blot in the moral or intellectual life of of David Belden. He fulfilled the highest duties of the citizen. He was honest, upright and a true friend; a man of distinctive genius, and one who will never be forgotten by any who have passed even momentarily within the circle of his striking and attractive individuality. We who best knew and loved him could best and from our innermost hearts inscribe these words upon his tomb:

" His life was gentle; and the elements
So mix't in him that nature might stand up,
And say to the world,—This is a man."

APPENDIX

ADDRESS

DELIVERED BEFORE THE SANTA CLARA VALLEY AGRICULTURAL SOCIETY AT THEIR THIRTEENTH ANNUAL MEETING, IN FEBRUARY, 1872.

BY HON. DAVID BELDEN.

Mr. President, Ladies and Gentlemen of San Jose,—Invited to contribute a few remarks to your annual festival, I could only urge my inexperience and inefficiency as an excuse for declining. With neither flocks nor herds, fruit nor flower, to swell this rich display of your county's products, I could not well refuse my mite—a few words of welcome, of comparison, and of suggestion—to the association that spreads before us these evidences of your county's capacity, and her farmers' intelligent industry—Santa Clara's credentials, in fact, to the high position long since accorded her, of being first in wealth, in variety of product, and in beauty, of that galaxy of counties that compose this favored State. And yet, while occupying the position thus assigned me, I feel that there must be before me many a practical farmer far better qualified for this task than myself.

Those whose life-long experience has brought them in constant contact with the varied agricultural industries of the whole country; whose lives and whose plows, starting upon the sterile hills of New England, have left a broad furrow of labor and improvement in the long line of States that marked their pathway to the Pacific; before whose footsteps the wilderness and the savage have vanished away, while behind them rose civilization, wealth and empire; who have tested in the sure alembic of personal experience the climate and soil of half the States of the continent, and now, full of years and experience, with unabated vigor, look with a jealous eye upon the sea that bars their farther journeyings westward;—from such an experience with what confidence might one speak—with what interest and improvement should we listen. And conscious, as I am, that many such are before me, I can only hope that the criticisms my shortcomings must merit may be tempered by the charity my acknowledged inexperience craves.

One of the most striking features in the social progress of the age is the advanced position of the agriculturist, and the widened field embraced by his industries. Not a generation has passed since the area of the farmer's exertions and calculations were all but limited to the fields he tilled, and scarcely extended beyond his immediate neighborhood. The character and extent of his crop were determined by the wants of his own household. His food and clothing were alike the product of his farm, and the scanty surplus, if any there were—if it passed from his immediate possession—was no more traced to its ultimate destination than had it never existed.

The current literature of the day and age was all but a sealed book to him. The Bible and almanac, with perhaps a few books of sermons and Pilgrim's Progress, were in most well-to-do families; and a weekly newspaper was taken by the more inquiring and wealthy. Its columns were devoted to tedious moralizings, a narration of trivial local incident, enlivened during political contests with acrimonious personal and political philippics. Not a word or suggestion to indicate to its agricultural patron that in the great world beyond the limits of his own county he had any interest; or that the events transpiring in other regions bore any personal relation whatever to himself. When he read that in distant lands famine was treading in the footsteps of frost, of drought, of tempest or of war, his gratitude that his own favored land was free from these scourges was qualified by no considerations of self-interest—by no thought that these distant misfortunes of others could in any way inure to his own advantage. To the mass of the farmers of that day the world beyond their own neighborhood moved before them almost like the phases of some distant planet, and they read of passing events as they would a history of by-gone ages. Fluctuations in grain, speculation in farm produce, he heard of as a species of dishonest gambling, and was sincerely thankful that he was neither a knave, a thief, nor a speculator. His oracle and price current was the country merchant, who furnished the few articles not produced upon his farm, and received in exchange, and at prices that scarce varied from year to year, whatever the farmer could spare—from a barrel of pork, or a load of wood, to a handful of feathers, a pound of rags, or a string of dried apples.

The slow accumulations of a rigid economy, in Spanish milled dollars, were stored in the traditional stocking, made specially secure by tying with a tow string. This treasure was kept in a wooden desk in the bedroom of the owner. If the farmer were absent for a night—an event that would occur about twice in an ordinary lifetime—the good wife provided for this increased responsibility by bracing a stick against the outer door, placing the kitchen tongs near the head of her bed, and the stockinged treasure between the mattresses—confident that against such ingenious and formidable precautions no robber, however desperate or skillful, could possibly succeed.

The tillage of his land, the accumulation of additional acres, was the toil and ambition of his life. At regular intervals the old stocking was emptied, that the farmer's boundaries might be enlarged. He was always negotiating for the purchase of some adjoining field. And when, full of years, his life of simple, honest toil was ended, and the old farmer himself harvested by the great reaper Death, the measure of his life's success was the acres he had accumulated, and of which he died possessed.

Such, as a rule, were the farmers, and such the farming, of that olden time; and even to those who may recognize in this brief sketch a familiar picture, the original has well-nigh passed into a mere tradition.

There are those indeed who regard the age so rapidly disappearing as constituting the true era of Arcadian simplicity and happiness, and regretfully contrast the era I have depicted with the fast and feverish times in which our own lot is cast. It is no part of my present inquiry to discuss the comparative happiness attained under customs and manners so widely dissimilar. It is the characteristic of man to recall regretfully the past, and with hopeful confidence to anticipate the future, and thus underrate the present through both memory and anticipation. In this we doubtless err. The world has not gone backward, though we may gaze regretfully behind us. In our own day there is doubtless more comfort and enjoyment, a more thorough comprehension of the purposes of life, a more intelligent appreciation of its capacities and duties, than in any preceding generation. It is, however, with the practical facts, the changed condition and position of the farmer, that I am dealing, and not with ultimate results.

The intelligent agriculturist of to-day, in the cultivation of his farm and the considerations that direct his efforts, deals with elements and marshals events that in the days of his grandsire would have marked him as a prodigy of wisdom and forethought. The outside world, then so remote, has been brought, by changes in communication and transportation, to his very door. The wealth, the wants and the calamities of distant nations are to-day weighed in the purposes of the intelligent farmer, as they are in the council chambers of statesmen, the cabinets of kings. A war that should call Europe to arms would multiply the hosts of his plowmen. The value of his grain varies with the shifting fortunes of some distant battle; and changes in dynasties and the fortunes of kings find their swift reflex in the varying value of his products. The seasons, too, of distant countries are watched, as he notes the changes of his own skies. A blight upon the vineyards of France is wealth to the vine-growers of this State. A failure in the cotton of India or Egypt is fortune to the sheep-raisers of California. Commerce, all-reaching and comprehensive, has made of all the varied products of human industry one vast reservoir, and like the arteries of the human system, the telegraph conveys instantaneously the slightest pulsation to the remotest member. The farmer of a generation past hardly questioned the price of his commodities, beyond the country store of his vicinity, or the wants of his neighborhood. His successor of to-day knows each hour the markets of the world, and estimates the requirements of a thousand million of people. Not an event can transpire, however remote, that does not find an instant response in the changed values of his commodities. Taught by the events of the past, he seeks to anticipate the future, and becomes at once the historian and prophet of the political and financial events of his own generation. The labor-saving machines of the day enable him to utilize, in a marked degree, the changing conditions of the times—to call, upon a moment's notice, from his work-shops and store-houses, a trained and tireless host that with the precision and docility of mechanism quadruple his capacity as a laborer with scarcely a perceptible augmentation of his expenses. With these the changed condition and increased capacity of our farmers, it were indeed strange did we not find him occupying a very different position from his predecessor of half a century since. The enlarged field of observation could but expand the mind, while the increased leisure gives ample opportunity for study and reflection.

It was enough that the old-time farmer could turn the furrow and swing the scythe. A machine, to-day, does all this, and the man has stepped forward. The regular monotonous routine in which crops were grown, without reference to want or demand, has given place to intelligent anticipation of needs and markets. Formerly he was the best farmer who tilled the most acres, and the senseless results of a survey determined the measure of distinction. To-day the book-keeper awards the prizes, and deems him the best farmer who produces the largest returns with the least expenditure. Then the village blacksmith fashioned the plowshare, without the slightest reference to the rules that should govern its shape. To-day the highest geometrical talent, and the most exhaustive experiment, fix the form of the plow; and the same rules determine the curve of the steel that traverses your prairies, that fix the lines of the lordly steamer that plows the seas.

Equally marked is the improvement in the special literature addressed to the agriculturist. The few publications that then existed were devoted to anything but information for the farmer, and were still further disfigured by grotesquely ludicrous woodcuts, intended to represent noted prize cattle, sheep and swine. To-day the agricultural journals are conducted by the first minds of the country—their columns replete with information upon every subject that can instruct or interest, and illustrated in the highest artistic style with the special excellences of the agricultural world.

The specimens that make up your agricultural fairs show, in a still greater degree, the improvement in judgment and taste that characterizes the exhibitor of to-day. The animals that formerly competed for prizes were, as a rule, the overgrown and unwieldy exceptions that appeared as phenomena in the farmer's herd, possessing no other merit over their fellows than the fact of unusual or deformed size; and if that were accepted as an advantage, generally incapable of transmitting this questionable merit to their progeny. The vegetables were the monstrosities of the field and garden; quality and flavor were scarcely considered.

Who that has once witnessed will ever forget the old-fashioned cattle show? the oxen of each township, decorated with ribbons and tassels, driven in a yoked-line to the county seat, the merit of each locality being the length, rather than the quality, of its train? the overgrown pumpkins—yellow, coarse and common—their merits determined by the judgment of a steel-yard? the beets and ears of corn, tested by the same high standard or the application of a two-foot rule? the bed-quilts, intricate and wonderful, star pattern and American eagle style, in whose structure every wardrobe of the village recognized its particular contribution, and in which the number of pieces employed and the age of the artist were multiplied together in some unaccountable way to ascertain the merits of the completed article? the grand performance of the day, when a pair of venerable stags, scarred and scrawny from their life-struggles with rocks and stumps, dragged a cart, with the wheels chained, and loaded with stone, up a steep hill? the awkward boys from the farms, looking red and uncomfortable from wearing their Sunday clothes upon a week day, leading about, with a shame-faced gallantry, the rosy-cheeked damsels of their own neighborhood, giving their partners a significant nudge when they came to the particular squash, or pumpkin, or pen of pigs, contributed by the complacent gallants, and then, in a burst of reckless prodigality, treating their fair companions at a stand, kept just off the grounds by the colored Aunty of the whole community, to ginger cake and root beer? the minister, who opened the proceeding with a prayer profoundly grateful for the wonderful gifts spread before them? the young lawyer who delivered the address, in which, with a truthfulness characteristic of his profession, he assured his gratified listeners that there had never been such an exhibition before, and probably never would be again? the award of the prizes? the attempt of those who were successful to look indifferent, and of those who failed to look satisfied; and the entire failure of both to maintain the proper expression? All this and much more of that medley of incongruous uselessness that made up the old-fashioned cattle show who can, or who would, forget? And yet, while the matters of exhibition and the standard of merit have immeasurably improved, we should feel lost if the big pumpkin and the long ear of corn did not put in an appearance. We still welcome, in the inevitable patch-work bed-quilt, the memories of those genial old grandmothers who are so proud of their labors, while we are so proud of their lives. And gray-haired sires and stately matrons may feel old recollections kindled, as they see awkward boys and pretty maidens promenading about, as they did at the cattle show of forty years ago. Even the modest lawyer, considered a nuisance, is regarded as a necessity, and we still retain him, with the big pumpkin and the little pigs, as part of our modern exhibition.

But, retaining all this, how marked the improvement that meets us upon every hand. The animals that invite your attention and compel your admiration are not the results of accident, but of a principle long known to the stock-breeder, though apparently just dawning upon the enlightened world, as the Darwinian theory, the doctrine and results of natural selection—of special adaptation. The cattle now in your stalls come with pedigrees like Norman kings; and the merits and characteristics of their race they transmit to their progeny with all the certainty of a mathematical demonstration and the assured supremacy of a royal line.

The accomplishments of the stock-breeder seem almost like the marvels of a new creation. He needs a new form for his comfort, his pleasure, or his pride, and, from the rough uncouth forms about him, he fashions the animal to his wants or his fancy. Grain, fruit and flower have been found within the same great law, and have responded to the same creative genius—their varieties enlarged and qualities improved by the same certain process—until accident and chance have been all but banished from the calculations of the herdsman—the field of the farmer. The results of all this are before and around us. The exceptional individuals that constituted the staple of former exhibitions are superseded by the specimens of improved varieties, in which the merit of beauty, quality and quantity is established as a type implanted in the race and reproduced through the entire family with absolute certainty and precision.

From this brief and imperfect summary—from this magnificent display that surrounds us—the advanced position of the farmer, and the improved product of his skill and labor, must compel a hearty acknowledgment.

A few suggestions to the cultivators of our valley may not be inappropriate, and with them I conclude. The changing condition of the varied industries of this State can but impress the most superficial observer. That other changes, equally marked and significant, will attend its immediate future is equally apparent. The prudent and intelligent farmer prepares for the changes he sees approaching and anticipates the conditions with which he must deal. Twenty years have not passed since the raising of cattle was the great industry of this section. It was then universally conceded that the immense territories that lay to the east must furnish an inexhaustible market for our surplus stock. The vast sandy plains that lie to the east of the Sierras, whitened with alkaline efflorescences, or overgrown with the nauseous sage-weed, seemed blasted with the curse of utter and eternal sterility. And yet how simple and strange a discovery has changed all this—transformed this region into a pastoral land of marvelous capacity, and given a formidable rival where we looked for an unquestioning dependent. It is found that the sage-weed, bitter and worthless while green, touched by the winter frost becomes a nutritious and grateful herbage upon which cattle feed and fatten through the entire winter—that, transposing the experience of other climes, where the provision for winter is prepared under summer skies, in this weird region the winter makes this strange provision for the winter's needs. Utah, Colorado, and Arizona are demonstrating their immense resources in the same direction, and the vast area that lies between the Rocky Mountains and the Sierras is fast establishing its position as the future pastoral region of the continent. Nevada may well exult in this newly-developed resource, and the future may utilize other of her special productions. Could some fowl be discovered, of not over-sensitive stomach, to feed and fatten upon the boundless harvest of her horned toads, in these cheerful reptiles the sage-brush land might discover treasures rivaling even the product of her Comstock lode. Be this as it may, in her cattle product this region must prove a formidable competitor to our herdsmen, even in the markets of their own State; and the day is not far distant when the beef supply of the mining sections will be wholly drawn from the region east of the Sierras.

The growth of wheat, as a special and principal product, may be also regarded as a questionable industry for our people. The exhaustive nature of the crop, the steady diminution in the product per acre, the distance of our markets, and the violent fluctuations in price, have made the record of this production a checkered history of fortune and of failure in the past history of the State. Coupled with the fact that this grain can be successfully grown over so wide an area, that new regions are being constantly devoted to its production, may well suggest the inquiry, why should we exhaust our soil and enter the field against so many and so formidable rivals, to produce so uncertain a commodity? The same may be suggested of most of the fruits regarded as the specialty of this valley, and certainly here grown in unequaled excellence and profusion. With scarce an exception they are the common product of a wide belt that stretches to the Atlantic seaboard; and the slight advantage of superior size or flavor hardly overcomes the cost and waste of lengthy transportation when brought in active competition with the local product of distant regions; while the perishable character of many of our choicer varieties must limit their consumption to the immediate vicinity of their production.

These suggestions are no sudden discoveries. The change in our markets, new-found competition and over-production, both in staples and luxuries, have been long observed, and are each year more and more sensibly felt. Nor need this result be regretted, if the necessities thus created shall open our eyes to the real resources of our State—not those in which we are equaled or excelled by half the world, but those of which we have a perpetual monopoly, that legislation cannot disturb, nor development elsewhere equal.

We regard, and justly, that farming careless and wasteful that suffers worthless weeds to usurp the place of valuable grain; that burns straw instead of storing it for fodder or restoring it to the soil. But only in extent does this differ from that waste that produces a coarse, inferior, or less salable article, where one more valuable might be grown. The result is the same when your land groans with rotten and unsalable fruit, or teems with poisonous, worthless weeds. In short, that is improvident and wasteful farming that does not employ to the utmost every special advantage, whether of soil or of climate, and that leaves any resource unemployed from which more profitable or certain results might be attained. Such a resource, as yet comparatively untouched and untried, we have in our immunity from severe frost, and superabundance of summer sunshine. It is these, the special gifts of this favored coast, that are now largely wasted. It is in employing this semi-tropical climate for the growth of semi-tropical products that your valley will find exhaustless and unrivalled resources.

The great valley of the Mississippi may equal you in fertility of soil; the virgin regions of the Northwest in the growth of wheat; cattle and sheep find their true dominion in the great plains misnamed the "American desert"; in all these, the common products of all countries, we must find rivals upon every hand. But in that soft, mild season of rest we term winter, every plant of the tropic finds a genial welcome; and the long season of unbroken sunshine, that for months but parches and burns your arid plains and gleaned fields, would be well and wisely husbanded were it ripening the almond, the olive and the date, or a score more of the fruits of the tropics, that have been for ages the necessity as well as the luxury of the commercial world. It is in our frostless winters and our prodigal sunshine that California's real wealth—her true agricultural supremacy—consists. In this she can have no rival; and these, her exhaustless treasures, will find their value enhanced as the less favored regions about her shall become populated, and facilities for transportation increased. In this direction lies the true field for experiment, development and wealth. The grape, the mulberry and the olive, pet children of the sunny shores of the Mediterranean, stand at our threshold, and seek here a home. They come to renew, upon our virgin soil and beneath our summer skies, that history that made their olden home at once the garden and the mistress of the world; while many another plant, to-day unknown and unnamed, but with a future making it priceless in medicine, in luxury or in art, will yet find here its genial home.

Commerce, chemistry and mechanism are constantly widening the field of our production, and adding new value to our known resources. Sugar from sorghum and beets, paper from straw, the fibre of the Ramio plant, these are scarce a tithe of the names and products a few years since strange and novel, but now the growth of every farmer, familiar as household words. These are but the earnest of a broader future—the vanguard of greater hosts to come.

The pampas of South America, the burning plains of Africa, the Andes and the Himalayas, the Amazon and the Nile—storied stream and unknown river—all bring their treasures to our doors, and ask but a trial at our hands. It has been our boast that the soil and climate of every zone was to be found within our borders. Let it be our pride, as it is our duty, to see that the products of our State are in full keeping with her wondrous capacity. Intelligent inquiry will instruct us as to the products of all other lands; intelligent experiment will speedily determine their adaptation to our soil and climate.

It is upon this widening field—broad as the world, exhaustless as science—that the farmer of to-day is entering. With him, as helpmeet and co-worker in a larger sense than in any other age or any other vocation of life, comes woman—no longer as in the past the menial or the drudge, but the builder as well as the sharer of the fortunes of her house. The woman of to-day, who hopes for the advancement of her sex – her release from the thraldom of custom—may point with confidence to the accomplishments of her sisters as tillers of the soil. The sinews and strength that were the requisites of a ruder age are now superseded by the genius of the inventor, and the woman of energy finds her physical powers supplemented by the skill of the mechanic with muscles of iron and sinews of steel, and engines beside whose tireless strength man's mightiest efforts are as nothing. The farming of the present and of the future will employ more of brain than of brawn ; and it is upon the fields and farms of your State woman will assert, first and most successfully, her full equality with her co-laborer, man. And in that field of inquiry and experiment to which I have already adverted, she will be in no way behind her stronger comrade. That investigating spirit that lost to us Eden yet lingers with the daughters of Eve, but the prohibition is withdrawn. The command to-day is, "taste of the fruit of every tree." And woman, roused by emulation, instructed by inquiry, and guided by experiment, will restore man to his lost heritage by robing our western world in the pristine loveliness of Eden.

ADDRESS

DELIVERED BEFORE THE PHILALETHIC LITERARY SOCIETY, SANTA CLARA COLLEGE, AT THE FIFTH ANNUAL CELEBRATION, MAY 1ST, 1872.

Mr. President and Members of the Philalethic Society, Ladies and Gentlemen:—Three years ago it was my good fortune to be present at the Commencement exercises of one of the principal colleges of the nation, and it was with no small interest that I observed the confident demeanor of the class that, that day bidding adieu to pupilage and instructor, was just entering upon the duties of active and responsible life. Nor could I forbear contrasting the unalloyed confidence of these youths with the mingled emotions of pride, hope and anxiety, with which parents, relatives and friends eagerly regarded the exercises of the day. Pride in the Exhibition and triumphs they were witnessing; hope that these were but the earnest of long years of success and usefulness; anxiety lest, perhaps, this promise so bright, this morning so brilliant, might find over its coming day some cloud to chill, some baleful eclipse to blight and darken. With that day's actors all was hope; with the spectators, there was a saddening memory. Other classes and the leaders of other days were, perhaps, passing before them; recollections of those whose promise had been as hopeful, whose memory as bright; but who had passed away unnoticed and unremembered; or, maybe, whose useless lives were only recalled to point a moral or illustrate a warning. These elder ones were perhaps remembering the days when, full of confidence, they themselves went forth from the same old walls, fancying no achievement beyond their power, no prize beyond their reach. And as they measured the meagre performance beside the glowing promise, and saw how much failure and disappointment life had meted out to them, what wonder that, with all of pride for child and friend, there would rise unbidden and unwelcome the dark foreboding of possible failure and shipwreck. But to the youth themselves, flushed with academic triumphs and garlanded with collegiate honors, there came no misgivings of that welcome future, no questionings of the fame and the fate that each was assured awaited him. The past of their lives had been but a training for the course before them, and like mettled racers they fretted impatiently at the barriers that arrested their progress and delayed their certain triumphs. The world, as yet unknown and untried, was before them; its glittering prizes upon every hand, and all of life unclouded and untested, in which to win and wear its noblest trophies. Fearless and confident for themselves, they wondered that any could doubt for them, and already, as conquerors, traversed in fancy the fields as yet untouched and untried. "What shall I do?" was the bold challenge of each to fate and the future, as he resolved that the triumphs of the school should be but precursors to the more substantial victories of manhood and of after life. And so, with boundless hopes and high aspirations over them, the benediction of their Alma Mater, and with them the prayers and good wishes of all, they bade adieu to college walls, and were swept on and away in the surging stream of life. Buoyant and bold now, on what seas these gallant barks shall ride, on what shores find harbors of refuge or helpless shipwreck, no one can predict, no prophet foretell. But we know; well and sadly all know, that upon this little band of a score or more all these changeful fortunes wait. And then I turned back to the gray old walls, and there found assembled the seniors of the class that that day, fifty years before, "Old Yale" had sent forth as her chosen and honored children, to fight in their day and generation the unending battle of life. Varied and strange were the stories they told, those veterans of three-fourths of a century. From all lands and with every changeful fortune they came—the honored and the unknown. Wealth and poverty, care and contentment, success and failure—each and all had left, in deep and sure impress, the certain chisellings of a half-century of carking time. And here they all returned and once more stood side by side where fifty years before they had parted. The circle that for these measured the race of life was well-nigh complete. Memory had usurped the domain of hope. The goal was behind them and the prizes of life were won or lost forever; and each knew for his fellows, or felt for himself, that they were now but waiting. The confident enquiry of half a century ago, "What shall I do?" had now been answered. Time and the world, in which and with which to do, were fading away, and the doubtful query of each old man to himself, as in solemn retrospect his life passed before him, was, "What have I done?" And so upon that bright spring day met Youth and Age, and strangely I felt as I heard the mingled questions of those who went and those who came. And thus each year "Old Yale" epitomizes within her walls the great drama of life. Each year the mighty mother sends forth her children in the morning of their day and bids them do; and in the dim twilight, when the shadows are lengthening eastward, tenderly and solemnly she welcomes them back, her worn and weary ones, bring they golden grain or biting thorns. She listens to the story of their lives, and in her memory treasures and in her archives records of each "What he has done." And then I thought of the great world without as within the collegiate walls, and I saw the same unending procession ever and everywhere passing before me. The hosts that, hopeful and confident, went forth; the few that, weary and doubtful, were still returning. The confident inquiry like a warrior's defiance, "What shall I do?"—the sad and solemn refrain like the moan of the sea, that followed after, "What have I done?" And thus, while the world stands and the generations like the waves of the ocean flow on in endless succession, the question of Youth will ever be, "What shall I do?"—the answer of Age and History still be given, "What each has done!" Important questions these—the first, all of hope—the last, naught but history; while between the two lies for each man and for each generation of men all of human exertion, achievement and existence. And first, "What is there to do?" To one familiar with the attainments and discoveries of the past, the research in every domain of intelligent enquiry and investigation, it may well seem as it did to the wise King of Israel, that there is, and can be, nothing new under the sun. Away in the dim, misty realm of tradition rises the shadows of the founders of nations and of faiths. From the distant ages where superstitious gratitude ever deifies merit and builds the Pantheon for its benefactors, come the demi-gods who walked the earth in its infancy, who chained the spirits of evil, who taught the arts and led men in the ways and walks of civilization, of virtue and of social order. In every art of peace or war, in every avenue of social, moral, or intellectual development, the name and the fame of these, the founders and discoverers of the past, magnified by the mists through which we behold them, rise before us. Coming to the historic age—to the day when record takes the place of tradition and fact of fable—each avenue of attainment seems like a beaten path with the footprints of the hosts that have gone before, until the arts themselves bear the names and sound the fame of their great illustrators. Solon and Lycurgus in legislative fields, declaring the purpose, defining the principles, and laying the foundations of social organization. Coke, Blackstone and Kent, in our own language, reducing the intricacies of law to system and raising it to a science. Mansfield, Marshall and Story, the intellectual giants of the arena of jurisprudence. Kepler, Newton and Herschel declaring the secrets of the heavens, weighing the planets as in a balance and measuring distant worlds as with a line; proclaiming the laws of their being, the secret of their creation. Theology through all its branches, illustrated and illumined by the studies and researches of millions who for centuries devoted to it their lives; its principles announced by revelation, maintained by argument, or established by dogma. Mechanical invention, traversing every field of human requirement; no subject too vast, none too minute, for its exercise; changing with equal facility the channels of commerce or the tools of the artizan; establishing an empire or a factory; augmenting the capacity of the humblest laborer or the power of the mightiest king; outdoing the finest efforts and exalting the dullest conceptions of man, until, like the demon of German tradition, invention has well-nigh usurped the place of the inventor, till man the creator scarce equals the marvels he has called into being. Astronomy, geology, chemistry, the whole range of experimental sciences exhibiting the same apparently exhaustless research in every direction; stretching the vast domain of knowledge attained, of things known, until the inquirer of to-day well may fancy that whatever of zeal, industry, or capacity he brings to the duties of life, the man of the nineteenth century can be but an humble imitator, an eleventh hour loiterer into a harvested and gleaned field, and that in some other era or former age he might have achieved the success and attained the eminence now denied him. This disposition to overrate what has been done and to underrate what there is to do, to fancy that our opportunities do not equal our capacities, is a very common weakness of men, much oftener felt than expressed, and not always dependent upon a very critical review of the past or a just estimate of the resources of the present. This disposition comes generally with mature years, and is oftener found in middle age than in youth. If we honestly analyze within ourselves the feeling, we shall probably admit that it is the apology each makes to himself for foiled promise and disappointed expectation. The excuse of a mortified self-vanity, it is strongest when frequent failure has shaken confidence and when gorgeous imaginings have given place to sober and unsatisfactory realizings. We strive to convince ourselves that the causes of failure are not in us but in the world, the age, the meagre opportunities given us in which to do. We trace the causes, we read of the exploits that make and emblazon history, and fancy that had we been there, we could have been all that and more. That in the days of revolution we had been distinguished as patriots; that legislation and theology had in us founders, had they but waited our coming; that steam and the telegraph could not have eluded our discovery, Kepler's laws or Newton's theories our research; that it was a commonplace foresight that acquired wealth in the days of the Rothschilds and the Astors, when the sites of great cities were but cattle pastures, or even in the palmy days of '49, when gold was found in the bed of every rivulet, and wages were ten dollars a day. We forget the hosts of those days who accomplished no more than we are achieving; the millions that lived and died unnoticed and forgotten, as will the millions of to-day; that the days of '49 had more of failure and disappointment than the prosaic days of '72.

And still, thus carping at the present, the croaker of to-day dreams on, fancying he might have been a Cæsar, accepting the warnings and escaping the dangers of the Senate Chamber, or a Bonaparte without a Moscow, Waterloo, or St. Helena in his history. He excuses himself from any active exertion in the present, assigning reasons and pretexts satisfactory to himself. He disdains politics, because here demagogues succeed and honest merit often fails, and, because knaves and fools often steal or stumble upon success, concludes that no honest or intelligent man should compete for prizes that may be thus acquired. He forgets that Cæsar was a demagogue with the democracy of Rome—that the same cavilings and repinings have characterized every age and generation of men. To all this he is blind; and so, shutting his eyes to the opportunities that press upon him, he wastes his present in illusive fancyings of what he might have been in some remote and unattainable past. And yet when we properly estimate this past; when we take the true measure of its attainments and its discoveries; when we contrast it and all its boasted accomplishments with the opportunities of the present and the promises of the immediate future, we shall find that it dwindles to a point and sinks into utter insignificance, and we shall feel as did the philosopher, that all its treasures are but pebbles and empty shells, while before us, untouched and unexplored, stretches the vast sea of knowledge. The man of to-day must acquaint himself with the lore and the discoveries of the past as the alphabet for his own future. He must see these as did Columbus the headland of Spain—the landmarks from which to steer, the bearings to be left behind him. To generation after generation these cliffs had arisen as the monuments of Ultima Thule—the pillars established by Hercules at the end of the world. To the navigators of antiquity they were beacons and guides that pointed to harbors and to home. But to the great Genoese, these grim sentinels, silent to all others, spake. To him they told of the mystery beyond, of seas untracked, continents undiscovered, a world unknown. To him alone they pointed outward to danger, toil and discovery. He read their meaning—he followed their bidding and called half the world into being. So let the youth of to-day, the man of the future, fix his bearings and establish his landmarks in the past, but remember that his own career must be all in the future. He will find the horizon ever widening as he advances, and will soon discover that to him the ocean of knowledge is indeed a shoreless sea.

Let us glance for a moment at some of the leading pursuits of life and contrast what has been accomplished with what remains to be done. Does religious conviction invite to the duties of the teacher, and is the enthusiast emulous of the fame of those who, in the infancy of the Church, battled with idolatry and heresy—contending with scoffers at Athens and the wild beasts at Ephesus? Does he regretfully fancy that for him no toils, no obstacles, no sacrifices remain? He need not fear that this field of strife and sacrifice can ever be gleaned, or that he will not find danger as great and opponents as active and formidable as confronted the Fathers in ancient days. The contest has changed, but not ceased. Active idolatry and aggressive heresy may be passing away; the altar of the pagan deity may not confront the worshippers of the One True God; faith may no longer be arrayed against faith, each struggling for the supremacy and proclaiming itself the truth. But more insidious and deadlier foes beleaguer the faiths and assail the creeds of the day. Materialism and indifference have taken the place of the more active assailants of the past. The legions of the doubters are no longer to be found in distant lands; they stand to-day at the door of the believer. They are of his own blood and of his own household, professing no faith, contemning all creeds, unassailable and well-nigh invulnerable. The skeptic and the scoffer are entrenched and encamped in every hamlet, armed and arrayed against every creed and all faiths. The theologian who fancies these opponents powerless and insignificant, unworthy his notice, hugs to himself a fatal delusion. Bold, inquiring and intelligent, the religion that has survived the trials and passed through the fires of eighteen centuries is to-day in the presence of a more formidable foe than when Julian proclaimed that Christianity should cease upon the earth, or when the Moslem besieged Vienna and vowed to stable his steed in the Church of St. Peter.

The weapons and the armor of the old theologians, the polemic champions of the past, who, starting from conceded premises, disputed upon interpretation and felt their way by the flickering and uncertain light of tradition, are useless and powerless before the new assailants. The sneer of Voltaire and the ribaldry of Paine are supplanted by a dialectic skill that, courteous, keen and decisive, must often wound if it do not always win. The Church's champion of to-day, the man who bears her standard and does battle in her cause against these new foemen, cannot entrench himself behind dogma, trust to the authority of tradition, or assume as conceded the teachings of revelation. He can select neither the weapon nor the field, nor assume a single fact. He must meet these subtle adversaries upon the broad field of the world, and must arm himself with all that research and discovery afford. He must gird himself with philosophy as with a buckler, and wield the sciences as a cimeter, and look well to it that, in the coming contest, knowledge, the handmaid of religion, be not found arrayed in the ranks of her deadliest enemies.

Time was when it sufficed for the Church that her children would believe and could suffer. In the presence of these new dangers, they must know and battle. Subtle disputations and nice distinctions no longer measure the area of controversy. Creed, dogma and revelation are alike involved, and the soldier of the Cross to-day enters the lists that a faith may live among the children of men. The man who shall accept this as his career, who shall make of this field his forum, need not fear but that the future will require at his hands all the skill, the knowledge and the sacrifice that honored the Fathers and crowned the Martyrs of the Church. Legislation and law, the rules by which rights are determined and secured, we have fancied were so fixed in precedent, so anchored in tradition and in the very vitals of society, as to be beyond inquiry and mutation; and yet to-day, from turret to foundation stone, the social structure is called into question. From the east come the deep mutterings of the rising storm. Already its whisperings are about us. With hopeful, with scornful, or with bated tones the ominous word "Internationalism" is passing around the world—the shibboleth spoken by all tongues—the spell that is binding in the strong links of a common and a settled purpose millions upon millions of determined men. It claims that the foundation stones of our social system are laid in wrong and cemented by injustice; that property is robbery, and education but the sceptre of tyranny. It purposes for the future an order of things in which every element, theory and tradition of the past shall have no place. Through revolution, anarchy and destruction it proposes a regenerated world. Organized in mystery and banded in might, it is rising like a spectre before the affrighted nations. As to the wrongs to be redressed and the rights to be established we may not agree, but we cannot hide from ourselves the fact that a mighty power is stirring the masses of the world to-day as they have never before been moved. We may shut our ears to the tread of this coming giant. We may resolve that chaos and anarchy, reversing the laws of order and subverting society, cannot be. And so we may seek to shut our senses to the gathering storm or the pulsations of the earthquake, but still they come sweeping down, crushing in their pathway the works of men and leaving behind them but wreck, ruin and dismay. If the new element that is stirring and leavening the masses for vital action and radical change shall rise according to its avowed purpose and act according to its unquestioned power—if it shall accomplish but a tithe of what a fanatic or malign leadership now declares as its purpose—the man whose active life shall be cast in the next half century will have to deal with forces more dangerous and potential, with problems graver and greater, than had he who first conceived the idea of society and united men with the strong ligaments of law and order. But if changes thus radical be not experienced, if the forces that now presage so much of danger and discord be harmlessly dispelled, it can only be by remedying such evils through the established forms of law. The right to accumulate wealth without limit as to character and quantity; to aggregate in the hands of a few the lands and the capital of a country; to define the manner in which the burdens of government shall be shared and borne; by whom suffrage shall be exercised and the rights of minorities in the body-politic; these are but a few of the many questions of the day that press upon us and whose growing importance all concede. Harbingers of hope or spectres of discord, they will not down at our bidding. They must be met and answered, and in that new era which the radical and the reformer seek to inaugurate the coming statesman will find the field as broad, the questions as intricate, and the duties as delicate and dangerous as any that taxed the genius and established the fame of the law-givers of antiquity.

Does finance attract, and its glittering prizes allure? The field is unlimited, the reward boundless. The vast debts that seem the specialty of our era compel for their proper adjustment and management an acquaintance with the laws of trade and a knowledge of the principles of political economy that is calling to this branch of government the greatest minds of the age. The figures and forms of speech that captivated the fancy and beguiled the judgment of men have given place to the figures and facts that show how taxation may be most equitably adjusted and most easily borne. Mark it, my plodding friend, given to statistics and delighting in abstruse calculations, the man who bears the purse and lightens the taxes of the people will merit and will receive higher plaudits than the chieftain who gains battles or wins provinces at the head of his army. The demon of taxation will be ever before us, and he will be most highly honored who shall most successfully exorcise this fiend. The financier of to-day is dealing with the debts, the capital and the resources of all nations, and each hour there passes before him like a panorama the political and the financial world. The speculation of the morning, however remote the field, is realized at night, and, like the pulsation of some mighty artery, every city upon two continents throbs its instant response to the beats of the great financial centres. The laws of trade, the principles that fix the direction and control the currents of wealth, as yet scarcely comprehended, are proving themselves within a rule almost as inflexible as that which guides the stars in their course, beyond the control alike of edict and legislation and with results as assured as mathematical formulas. The financier of the future will anticipate the course and the fluctuations of trade, he will estimate the effect of every disturbance, political and financial, immediate or remote. He will analyze the causes and predict the courses of the world's trade and the fluctuations in values with the same certainty that the astronomer of to-day anticipates and measures the marches of the tides. The financial kings of the past were those who could occasionally guess the application of this great law upon some single event. Their successors will know the law, and will apply it with unerring accuracy to every transaction and event that may affect values.

In medical science, see the vast field of remedy and research that chemistry and mechanism are opening to the investigator. The microscope, once the toy of the shops, but now exhibiting the circulation of the blood that Harvey died striving to maintain; exploring the mysteries of life and opening new and wondrous chapters in the pathology of disease; declaring the laws of organic structures and tracing to their first condition half the epidemics that plague and destroy our race. It unfolds the marvels of the minute, that without it were unnoticed and unknown. It has penetrated the deadly mystery that sweeps with the cholera around the globe, and unfolds to the student a world of wonders of whose existence his ancestors scarce dreamed. In astronomy, not a point in the visible heavens upon which improved appliances are not throwing a flood of light; the doubted propositions of the past set at rest by the increased area of a reflector; new fields brought within the view of the observer and new problems demanding solution, until the known systems of the past seem but the portals to the universe upon which we are entering, and our little knowledge but teaches us how little we really know. Turn from these sciences to the elements and forces that are made directly subservient to the uses of mankind. Electricity with its boundless power and wondrous capacities is just entering our service. Its velocity we have indeed utilized, but the mighty force that launches the thunderbolt and wrinkles the earth like a vast scroll in the throes of the earthquake is gliding unused, untamed and untaught, beneath our feet and all around us. The master who made of this genius our messenger has gone from among us, but other instructors will arise to teach this subtile demon new toils, and make of this terror and tyrant of the past the slave and servant of the future.

In geology and mineralogy how vast the field but how paltry the attainments. What incentive to inquiry? what reward for successful research? We know indeed that the world is old—ancient beyond the power of man to conceive, and that beneath our feet and within its foldings as within a shroud are the graves of innumerable types that have vanished from its surface forever. We know that about us, in the strong, stony ribs of the earth, are stored in boundless profusion veins of metal and mines of wealth that will employ and enrich hosts of explorers. We do not believe that mines of gold, silver and iron were created by chance or located by accident, yet of the laws of their creation we know nothing. The formation of the coal deposits is partly understood, but of the great silver and gold veins we have learned almost nothing. But the laws of these mineral creations will be yet ascertained, for geology and chemistry hold the key of discovery. A golden one it must prove to the man who shall find it and shall teach his fellows to search for these hidden treasures, not by the blind, senseless gropings of the past, but from the knowledge that here operated the law and worked the causes from which they must have followed. Recall the catalogue of the lost arts that, like the wealth in the caverns of the sea, all know the existence of but none can bring to light. Anticipate the inventions that to-day are trembling upon the verge of discovery—within our vision but without our grasp. Compare the probabilities of the near future with all the actualities of the past, and see how the possible expands and the actual diminishes. We pride ourselves upon the invention of the telegraph and the application of steam as a motive power. We flatter ourselves that the generations to come will always speak wonderingly of the genius that transformed fire into force and wielded it in the service of man. Vain delusion! The coming man will regard us and our achievements as do we the crude appliances of a by-gone century, and will wonder at an age that mined for fuel and boiled water for force. In that coming day the sunlight will take the place of the heat that slumbers in the coal, the winds will linger in their ceaseless circuits to do man's bidding, while the tides, surging in solemn and majestic might against the continents, will find themselves, with their old playmates the winds, harnessed to the engines and toiling in the service of their master. The man of that day will wonder that his ancestor of this, searching for new forces, could be blind to those about him; that in the whisper of the wind, the rush of the tempest, the roar of the torrents, the swell of the tides, he did not know and feel Nature's eternal and exhaustless motion, given to do his bidding and but asking service at his hands. In air, with its infinite compressibility, he has the reservoir in which these forces may be stored, and the day is not far distant when, from sunlight and sea, from torrent and from tempest, man shall harvest them and gather the strength that shall engage his tireless servants forever.

Turn from the arts of peace to those of war and witness anew the inventor's triumphs. The mechanic rules in the field as well as at the forge. It was the needle-gun of Prussia and the cannon of Krupp as much as the genius of Von Moltke that made Germany an empire and Napoleon an exile. The genius of Invention is to-day enshrined the goddess of Fortune. In her hands are the prizes of peace, the issues of war and the fate of dynasties. On the field as at the anvil, the worker in iron fashions the ruler's sceptre and forges the sword of the warrior in a broader and a more significant sense than when he shaped the blade of the Crusader or tempered the cimeter of Saladin. From this brief summary of the past and imperfect outline of the future, the magnitude of the field, and the opportunities in which and by which to do, will be more than apparent. The inquiry how we shall best do is too extensive for the hour and the limits of this address, but of this we can be assured, that the conditions of success will remain the same however the field or the future may change; that industry will bring improvement, research, discovery, and knowledge, power; that whoever may bear the insignia of rank, to intellectual greatness will be given the leadership of men and the power and dominion of the world. The generation that is to-day asking what it shall do, will be in the maturity of its intellect and the zenith of its usefulness when the twentieth century dawns upon the world. It will have grappled with the questions that to-day rise so portentously before us and have solved the problems that now vex and disquiet. It will have strengthened the ancient bulwarks of law and order, or laid anew, upon a broader, a deeper and a surer basis, the foundations of a body-politic. What future it may achieve, what lost arts restore, what new inventions add to the acquisitions of man, what engineering marvels it may conceive and execute, what may or may not be done in that prolific future, no man can say—no prophet foretell. But the shadows of great events that are coming lie broadly about us, and we know that of this generation it will be written as of the antidiluvian world that there were giants in those days, and that many a name to-day unnoticed and unknown shall blaze in living light upon the scroll of fame, while the record of "What they have done," History shall attest to remotest ages in the story of their toils, their trials and their triumphs.

SANTA CLARA COUNTY PIONEERS.

At a meeting of the Pioneer Association of Santa Clara County held in Music Hall, in September, 1876, Judge Belden delivered an address, of which the *Mercury* speaks as follows:—

Then came the address of Judge Belden, one of the happiest offhand discourses that ever a pioneer or any outsider listened to. It sparkled all through with good clean wit, which philosophers are unanimous in declaring to be true wisdom. It was one of those fascinating conversations in the hearing of which the pencil forgets its duties in the hand of the reporter, so wrapt is the attention with the manner as well as with the ideas of the speaker. It was like a panoramic view in which the depth of coloring and the seemingly artless, but really artistic, shifting of the scenes precludes any cold calculation and plodding service of the interpreter.

Mr. President, Ladies and Gentlemen:—It is the almost universal comment upon the address of an occasion like the present, "Very good, but too long for the occasion." This compliment is usually the concession of politeness, the prompting of good feeling. The fact is that occasions like the present are not for the primary or principal purpose of speech-making, nor do we assemble to be spoken to. All understand that. And the address is made a part of the proceeding, more as a matter of usage than of either edification or instruction. It may not be my good fortune to receive or merit the conventional compliment to which I have adverted. It shall be my honest endeavor to avoid the criticism that follows upon misplaced prolixity. Consenting at a late day to occupy the decidedly perfunctory position of speaker of the day, the very natural and anxious inquiry suggested itself: What shall I say? What is there to be said? What upon any subject appropriate to the occasion has been left unsaid? For thirty years, not only all over this State, but in many of the principal cities of the East, the pioneers of California have commemorated their advent to this coast. At each gathering gifted speakers, with whatever of genius, eloquence, poetry and pathos they could command, have told the story and illumined the lives and ways of the early pioneers. The paths of the men of Forty-Nine lay before me a beaten thoroughfare, a harvested field, its golden sheaves long since garnered, and to which I come at the eleventh hour a late and loitering gleaner. That a new generation has arisen since the event and the era we are celebrating, that there may be those to whom the story of that time may not sound like a thrice-told tale, that to these as new auditors this may come with any seeming of novelty, is an illusion by which, however willing, I cannot deceive myself; too many pens have been busy with the history of our pioneers. Harte, Mulford, and a score of others, with whatever of imagination might most artistically embellish fact, have told to these new comers far more than the one could ever have known or the other ever believed. Fact and fancy have been alike exhausted, and repeating with the wise King of Israel that there is no new thing under the sun, I must bring forth, from a sparsely filled store-house, what I know to be old. It is over thirty years since the report reached the East and flashed around the world of the discovery of gold in boundless quantities upon the banks of the American river. Exaggerated by repetition and magnified by distance, the El Dorado of the Pacific was represented as a land where, to any who chose to gather it, the fortune could be made in a month that elsewhere required the labor of a lifetime. Who does not recall the manner in which these marvelous reports were received and discussed upon every hand and in every community? The gatherings at the village store, the resolve of the restless and the adventurous, the reports each day of new parties who were selling out, sacrificing everything for the gold fields by the Pacific; the fear that it might all be dug before they could reach the mines. How the contagion spread until the staid and contented felt an unwonted fever in their veins, and looked restlessly and longingly after those who were starting; of the companies organized, in which the village Rothschild shared in the equipment for an interest of one-fourth or one-half the gains acquired. Of the thousands of machines invented and constructed, equally ingenious, equally elaborate and alike worthless, by which gold mines were to be found, and worked when found; of the counsels and exhortations of those who stayed and the promises of those who went; of the amount with which each resolved to be content, and the exact time he allotted to himself for acquiring it, and returning home; of the diaries to be kept, the letters written; of the notice in the local paper of each party as it departed, with the editorial assurance that, whoever else might fail, such men as that village sent forth must conquer success and make their mark in the world. Of the making up of the trains for the plains, the gatherings of the men, the trades, the purchase of equipments, the bickerings, the misunderstandings; of the men that everyone wanted to secure because they were rough and more accustomed to outdoor life, and whose presence must make the journey successful and secure, and who as a rule proved the most worthless and inefficient vagabonds in the camp; of the rotten ships that went from Eastern ports laden with precious lives and were heard of no more; of the diaries kept for a few days or weeks with scrupulous care and diligence, then the omission, first of a day or two, then of longer intervals, and then wholly abandoned; and finally, when the worn and wearied voyagers by sea and by land reached the end of their journeyings, of the new surprises that awaited them upon every hand; of the reports, bewildering in their contradictions, as to where the best mines were to be found; of those who paraded sacks of gold and lauded to the skies Northern or Southern mines, Mokelumne Hill, Hangtown, and told of fortunes to be had for picking them up; while back from the same place came a horde, ragged, foot-sore and hungry, cursing the State and the day they saw it, and especially the localities thus loudly commended. Of the grave deliberation of the new comer as to whether he should look for coarse or fine gold diggings, one day yielding to the fascination of a pile of nuggets, and resolving to look for mines with lumps about the size of a hen's egg, wavering as he saw the sacks of fine dust from the Yuba, and finally concluding that, as gold was purchased by weight and not by bulk, he would take his fortune in the finer dust; of his journeyings to the mines, his failures, his disappointments and disgust; of the letters home, written at first with methodical punctuality, but finally taking the road of the abandoned diary; of the numberless companies formed and expeditions planned to find some mine of marvelous richness, of which but one man knew the location; of the senseless explanation he gave for not having at least a specimen of these hidden treasures—sometimes Indians, want of provisions, or the like, and the uniform credulity with which we swallowed it all and fitted out trains, and sent parties with this fraud, only to know that we had been deceived, and ending generally in an unsuccessful effort to hang the deceiver. Of adventures by the Yuba, the forks of the American river, of Gold Bluff and Gold Lake, and the numberless golden mirages that danced before the adventurers of those days and lured them on to disappointment and disaster. Of the much that was noble and grand and self-sacrificing, and much too that was wild and wicked and weird in those men and in those fitful, feverish times. We remember our feelings as we left the homes of our nativity and fancied we could never be contented elsewhere, until as new interests, associations and affections grew up around us, the distance seemed imperceptibly at first to widen between us, and when we recalled the friends and scenes of former days they presented themselves with a vague, distant mistiness almost as though they were the recollections of another and not of ourselves. These are recollections common to us all, the reminiscences alike of the wanderer from Pike County, Missouri; Posey County, Indiana; the native of New England and the emigrant from the Rhine. And to the old pioneers, with these recollections of thirty years pressing upon us, how feeble must appear any attempt at portraiture in words. While I speak, like the whisper that wakes a hundred sleeping echoes, memory is marshalling before each of us the events of his California career. Like a panorama, the years of our pioneer life are passing in retrospect before us—the kindred that we left behind; the hopes that buoyed us up and lured us onward; the fortunes for good or for evil that have befallen each and that make up the checkered web and woof of the years that are but a memory. Could one but paint in words this picture as each now beholds it for himself; could I indeed describe what we all feel and know, the story of the pioneers could indeed be told, their memories fittingly enshrined for all time to come. This task, grateful though it would be, is alike beyond either the capacity I bring or the time I have allotted to myself for these remarks. There is, however, a feature of pioneer life, one class of the great flood tide that 1849 cast upon this coast, that has been but little considered. It is a foible of humanity to ever worship at the shrine of success, and to follow with blind laudation the favorites of fortune; the unsuccessful, equally or more deserving though they may be, find little place either in the memories of men or the chronicles of history. The stories of the pioneers are no exception to this rule. The successes and the achievements of the few are blazoned to the world; of the many who fought and fell in the vanguard of our heroes in the battle of life the story of their struggle ended with them. Who does not recall, in the adventures of the early days, the thousands that, smitten by disease, essayed the voyage round the Cape, the perils of the plains, with the cry "Health or a speedy grave." To not one in a score of these came the coveted boon of health. Their resting-places mark the pathway of our empire from the banks of the Mississippi to the shores of the Pacific, and until the sea shall give up her dead none may know of those pioneer hosts that found their resting-places in the dark depths of the ocean. Suffering and disease were their companions as they journeyed hither. Pestilence and hardship welcomed their arrival. By the rivers whose golden sands had lured them from peaceful homes and loving friends they fell by thousands, unknown and unremembered. Who does not remember in his own camp, or that of his neighbor, the delicate boy, the pet of the company, wholly unfitted for the hardships of the mines, but ambitious and hopeful, scorning the thought that he was not equal to any exertion and every position, bearing his part in the rugged work of his comrades, and pretending not to feel that day by day his powers were wasting away; the gentle strategy which gave to the failing boy the easiest of the labors of the camp; and, finally, the kindly counsel and the generous aid that returned him to die amid the scenes of his youth and the friends of his childhood. Who among the miners of those days has not scores upon scores of times given prodigally that some one, a stranger, perchance, whom he had never seen, might close his eyes in his old distant home. We are told that in such deeds treasures are laid up in heaven. If this be so, many a noble pioneer has the fortune awaiting him in the hereafter that was denied him here. Then there was one who delayed his going till disease pressed so fiercely upon him that the journey could not be made, and he knew that he must die amid strangers in a strange land. What feature of pioneer life presents more noble characteristics than the cabin of the sick and dying miner? Brave and uncomplaining was the sufferer, kind and gentle his watchers. When the last letters were dictated to loved ones, the last direction given, as he looked upon the familiar faces, while the shadows darkened about him, there came to these his tried and faithful comrades his last words—they were the last utterances of thousands—"I am going, boys. You have been very kind to me. God bless you all." "God bless you, old boy," would be the sobbing response, the last whispered benediction to the ear of the dying man. And then, beneath some lordly oak or stately pine, they fashioned his grave, and upon a rough board, or a fragment of stone, they scrawled his name and the place of his birth and the day of his death, and placed it above—and the pioneer's history was ended. All over the world there are thousands of loving, hoping hearts that have waited through all these long and weary years for the coming of these slumberers by the rivers, these dead of our early pioneers. Green be their memories and peace to their ashes, these our brothers gone before us.

Another and a more numerous class are those who have failed of success, and are counted among the fallen in the battle of life. They are that class upon whose every effort some malign influence ever casts a blight. Energetic and industrious, possessed of every quality that should command and does merit success, their pathway is one of unbroken disaster and misfortune. Born to disaster, flood and fire, casualties of every form, make these hapless ones their sport. Unlucky the world terms them, and if by this is meant fortune that only sees that she may smite, the term is well applied. Nowhere were this class more largely represented than in the mining regions and in the days of 1850. We can to-day each of us recall, perhaps some of us in our own experiences, the fields and the efforts of these hapless adventurers. Such we have seen locate a mining claim where upon either hand fortunes had been found, and every indication that human judgment or foresight could suggest showed that the same was before them. We have seen them enter with strong hands and buoyant hopes upon a work that might well-nigh task the patience and the resources of a State. We have seen the tunnel that was to unlock their golden treasure driven year after year, for hundreds and thousands of feet, through the flint rock, steadily, persistently and untiringly; against obstacles and embarrassments that might well have brought hopeless discouragement they struggled on, and at last, prematurely aged with the labors and hardships of this toil, with the best years of their lives gone, maimed and crippled by the casualties of their enterprise, financially beggared, they learned that there was nothing before them, that their work was worthless, their lives wasted, and, broken alike in body and in mind, they must seek elsewhere new fields for toil, must begin again the battle of life. What wonder that when long years of such exertion bring to the toiler but Dead Sea apples, bitterness and ashes, when he sees upon every hand wealth that recompenses efforts but a tithe of his own—what wonder that in bitterness of heart he arraigns the Providence that permits all this; that he looks with scorn and loathing on a world where fortune proves thus partial and unkind; what wonder that among the many that have met but successive misfortunes and unbroken adversity there should be many discouraged, misanthropic and reckless men. And when I see one of these worn and broken men still clinging to the scene of his former labors, if much of the manhood and nobleness of his early years seems lost or obscured, I reflect what hopes, what purposes, what affections may not have been in him crushed out in these withering disappointments, and in the language of the Master I say, that to him that has suffered much, much should be forgiven.

I have spoken of the pioneers of thirty years ago, for it is their advent to this coast we to-day commemorate; of the miners and the mountains, for it was there my own early associations were had. Of the pioneers in the valleys and the builders of the cities, we know only that they shared fully the measure of disappointment and disaster that befel their brethren in the mines. Where to-day are the cities and their founders that in 1850 lined the Bay of San Francisco —paper creations that were to rival London in magnitude, Paris in beauty, and New York in growth and prosperity? Who to-day can recall the name of either town or founder of these cities? What hopes and expectations vanished with them we may never know, for their projectors have disappeared as completely as the builders of the mounds in the valleys of the West.

I have spoken thus far of the failures and misfortunes of these former times. The successes have been many, and have been marked. They are known and need not be repeated. The spirit of the old Argonauts still survives. Bold, fearless explorers, they are still searching for the golden fleece. From California to the frozen zone, not a river, a stream, or a mountain that has not been tested and tried by these hardy adventurers. And the deserts of Arizona and New Mexico equally attest their energy and enterprise. Nor do the boundaries of the nation place any barrier to their progress; they are pouring in a resistless flood upon the land of the Aztec, and Mexico wakes from the slumber of centuries at the trampling of our peaceful cohorts.

The pioneer adventures of to-day will be the successful enterprises of the future, and the golden fleece that could not be won in the mountains will be found in our teeming valleys, our vine-garlanded hillsides. Wherever enterprise or inclination may guide their steps, the hope and the benediction that accompanied us to this new land go forth with them. And if, like many of us, they shall fall or shall fail in the field that is before them, may they ever merit success though they find but adversity. Pioneers of 1849, in the thirty years of our California life much of the time allotted to man has passed away. For many of us the shadows are to-day lengthening eastward. The crest on the waves of a sea that beats in ceaseless cadence on the shores of time each year sees many known and honored among us swept into the still depths of the hereafter. Ours be it to know that, whether remembered or forgotten, the work of our hands shall outlive the names of its founders, and that the empire we leave behind us, the nation's bulwark by her western sea, shall endure for all time, the handiwork and the monument of the Pioneers of the Golden State.

ORATION

DELIVERED ON THE FOURTH OF JULY, 1877, AT O'DONNELL'S GARDENS, SAN JOSE, CAL.

Fellow-Citizens,—It is well that there be seasons set apart for review and reflection. It is good for the individual that at stated periods he recall the events of his own career; that he review the bearings that youth has established and see whither the currents of life are carrying him. By such inquiry error is discovered and corrected and fatal shipwreck may often be averted. The censorship of such a retrospect, of a self-inquiry from which nothing can be concealed, in which memory makes strict inquisition and conscience pronounces infallible judgment, can but be beneficial. The man of mature years who thus marshals the past of his life before him, who recalls the plans and investigations of youth; who considers in their sequence the events which have influenced his actions and determined his career; who returns to the beginning that he may better forecast the end, and sees and feels, as the most successful man must, how much of life has been lost through wasted opportunity and misdirected effort, must rise from such reflections a wiser, though perchance a sadder man. As with individuals, so with the career of nations. In all ages of the world, in the histories of all peoples, a few great events have created epochs and left an impress that has determined the character and fixed the destinies of the nations. The advent of a religious teacher, the flight of a prophet, the birth of a ruler, the triumphs or the disasters of war—these are a few of the events which, surviving the era that gave them birth, mark with special significance the calendars of nations; and the recurrence of their anniversaries is heralded by solemn, by sad, or by exultant ceremonial as best befits the event commemorated. And thus each year we behold the faiths and the nations of the world journeying back in the pathway of Time; guided by the monuments upon their course, instructed by the teachings and traditions of the past, they traverse the centuries until the event and the era rise in lonely grandeur before them. They prove again the foundations of the ancient faiths, renew their vows of fealty, and, with clearer vision and surer purpose, press on in the course marked out for themselves. It is thus that great deeds and heroic achievements are made immortal. Fixed in the traditions of the world, they stand promontories by the river of Time. The ages roll over them, the generations pass by; their impress is upon one, their guidance with the other. Unchanged and unchanging, the stream of humanity takes its direction from them, and their influence, far-reaching and potential, is felt in ages and with races which know neither their origin nor their existence. Alas for the people that forgets its past; that has in its annals no example by which patriotism may be aroused or statesmanship instructed; in its history no deed of devotion, no act compelling commemoration; the memory of no day in which, rising above all lesser considerations, the country was alone supreme. Were such a nation known, could such a nation be, it would prove as careless of its future as indifferent to its past. Existing without a memory, it would live without a hope, and patriotism would be unknown where neither altar nor sacrifice had ever attested devotion to country. It is by anniversaries that the generations are linked together, that the deeds and achievements of a former era become the living-principles of the present, the guide and inspiration of the ages that come after. It does not follow, however, that by recalling an event or glorifying a day we honor the deed or benefit ourselves. The spirit in which such occasions are approached, the purposes to which they are devoted, may make them blessings or curses as we will; blessings, if from them we shall draw instruction, example, or warning; plagues and curses, if we return to the past that we may blindly worship there, seeking for idols and not for teachers, or vainly imagining that by laudation of others our responsibilities are met and our duties discharged. Let the spirit which this day invokes the past fearlessly question the present; let us turn the light of this former era upon our own pathway and see what of peril we have escaped, what of danger and pitfall may yet be about us; and let us rejoice when assured that we indeed have cause for rejoicing. There may be those to whom the anniversary we celebrate has become stale and irksome—to-day's ceremonial trite and tedious. Be it so. The recognition of this day is more than a pleasure. It is a high and sacred duty, for if the time shall come when this anniversary passes unhonored and unnoticed, when the nation does not welcome it with jubilee and high acclaim, when the deeds of the Fathers shall not be exultingly recounted, the future of the country hopefully portrayed, when the Fourth of July shall be remembered but as a pageant of the past, and the day and the deed shall live only in history, rest assured that with the memory of '76 the spirit it called into existence will have passed from the land forever, and the nation that forgets her patriots, her heroes and her martyrs, will be herself forgotten when her needs shall demand patriotism and devotion.

But, for this day and the event it honors, there will be no forgetfulness, there can be no oblivion. It is not a historic fact that we recall, but the birth of an undying principle. It was the Magna Charta of humanity that was this day published to the world, interpreted by all tongues, treasured in all hearts, to live while power and greed shall give to earth an oppressor, to man aspiration for liberty. Each year and a mightier nation welcomes the coming of this day. With the morning sun New England thundered her greeting from the Atlantic shore; it crossed the prairies of the great West in a wave of exultation, an anthem of thanksgiving; the Sierras kindled with a brighter flame at its coming, and away to the West, upon the lonely seas and in distant lands, the wanderer hails with joyful welcome his country's natal day. Woven into our history, our happiness and our hopes, this day can never grow old. Like the story of the Redemption, how simple the subject, how exhaustless the theme. It is the first lesson of infancy, the faith of manhood, the last recollection and solace of age. Day by day it is told, yet, to the believer, it comes each day with a new beauty, with an added charm; and from generation to generation is repeated, with undying interest and unabated fervor, the story of Bethlehem—the sacrifice upon Calvary. So with the story of our nation's birth and trials. Each year, and with new claims upon our love and veneration, we lead a new generation in this solemn pageant. Each year, a loftier standpoint, a wider horizon, spreads before us. We open the scroll of history, we invoke the memory of the past, and a century rolls back in the cycles of Time. Independence Hall, the Mecca of Freedom, rises before us, and we behold there assembled statesmen, sages and soldiers—patriots all—the noblest of the land. We stand by the Fathers as, in darkness and peril, but with religious reverence and unquestioning faith, they lay the foundations of the Republic. We listen to the utterances, fraught with individual danger, instinct with national life. We hear again the solemn words that gave to freedom a continent; to us and to ours, Liberty forever. What were these words that rung through the world like the trump of the Archangel? What new principle had those obscure dreamers called into being? "That all men were born equal and that the governments drew their just powers from the consent of the governed." We would say as said the Fathers, "Self-evident propositions these," and yet no such pregnant utterances had ever fallen from human lips as lay in these few sentences. It was the shibboleth of revolution that went forth to the world—a principle destined to undying conflict that sprang into the battle lists of humanity. The world had for a thousand years accepted without question the belief that kings were Heaven-commissioned and ordained, and that man existed but by the grace and for the purposes of their rulers; and these wild heresies of Independence Hall were met by the scornful derision of those rulers and the distrustful hopes of the ruled. It was, however, no idle dogma for scholastic disputation that these new teachers presented. It was the defiance of thirteen colonies, numbering less than four million souls, to the most powerful nation of the globe. It was to the issue of war and the logic of the sword they were submitting their principles; a war in which distrust from within was to strengthen the foe from without, to which savage tribes were to bring the horrors of their cruel usages; in which defeat was, for the vanquished, confiscation, exile and death. It was with these perils in their pathway, and beneath the shadow of the gibbet, the Fathers tried the issue that men were equal and self-government a right. Had the patriotism of that day faltered, had it counselled from the dictates of prudence, had it counted the cost or considered the vast superiority of its adversary, the principle asserted had perished with the breath that gave it utterance, and the first step of the young Republic had been its last. But the heroes of that day gauged their strength by the justice of their cause and not by the resources of their adversary. To numbers, they opposed a patriotism that made of every hamlet a camp, of every citizen a soldier. Deprivation and suffering were met by fortitude and endurance; defeat inspired resolution, disaster, redoubled exertion. In the darkest hour of the nation's night there was no prayer for peace, no thought of submission; in the scales of destiny they placed the prized boon, Freedom; and against this, all that men hold most dear they counted trifles light as air. Eight years of varying fortunes, with Bunker Hill, Valley Forge and Yorktown in her record, and the contest was over. The independence of the country was established. The problem of self-government was to be met. Speculation before, this was now to be tested by actual experiment; to be tried in the crucible of the nation's necessities. Exhausted by the waste of war, with commerce crushed, industry paralyzed and a bankrupt treasury, the young Republic set out upon this untracked sea while the world watched and doubted the issue of this bold adventure. But, though many watched, all did not wait. France, crushed for centuries by the feudal tyrants, woke with this trans-Atlantic light. She woke, and her waking will be remembered for all time as the great Revolution, the insurrection of a people maddened by outrage and oppression against all forms and faiths of organized society. Shaken by this dread upheaval, the governments of Europe rocked like reeds in the tempest, and it was only when these throes of anarchy brought forth Napoleon that the wild demon of destruction knew its master, and Revolution and Republic went down under the mailed hand of the Corsican. Such was the fate of the first of the nations which emulated the example and followed in the footsteps of the American Republic. Sinister augury this; and from every quarter came confident predictions of our certain and speedy shipwreck. Despite these prophecies of evil, despite the perils that beset her course, for eighty-six years the Republic advanced in an unbroken career of prosperity. War enlarged her domain, united her people and strengthened her government, while in population, resources and enterprise, her progress placed her without a precedent or parallel—the wonder and admiration of the world. The tests by which her strength and stability were to be established she had borne triumphantly, and we fondly believed that her greatest trials were ended. Delusive hope. There were yet darker days and more trying ordeals before the Republic. It was yet to be tested by civil war, and it was here that her friends and the champions of republicanism feared for her. The political oracles, the traditions of the world, all taught that republics most prosperous in peace, most formidable against enemies from without, were powerless in the presence of internal convulsions and helpless when their foes were of their own household; and, as in revolution the Republic had its beginning, so in insurrection and rebellion they predicted its certain and speedy end. The hour of her trial and triumph came. It came with the great Civil War whose dark shadow is just lifting from the land. A war, with the continent one camp, its people two hostile armies; with hatred abroad and insurrection at home. Through the fierce heat of a Presidential election, in the dark chill of a President's assassination—all these and far more were the dread elements of the storm through which the Genius of Columbia led up her children. Of the causes of the contest, of the passions evoked or the policy that followed, this is not the fitting place to speak, but the lessons it has taught, written all over the land in blood and in fire, cannot be overlooked or disregarded. It taught that if the Republic was on untracked and untried seas, the beacons kindled in her youth still illumined her pathway and directed her course; that a people untrained in war, skilled only in the arts of peace, could stand forth, an armed giant, at the call of the country; that in republican institutions a vigor and a vitality existed which no exigency could perplex, no danger appal. It taught that a courage as dauntless, a devotion as deep, a constancy as unyielding as proved the heroes of '76 still guided the counsels and inspired the patriotism of this people. The story of this contest is one page in the nation's history. Who would erase it? It is our bond to the nation's future. Who would cancel it? Estimated by the sacrifices of this struggle, who can measure the value of this Union? Warned by the magnitude of this contest, what danger from within shall again menace the Republic? And if the scars of this strife be not yet healed, if the passions of this conflict still smoulder and burn as the ocean heaves with the tempest, though the storm be past, why should we wonder? Could we expect, could we have it otherwise? It is the memory of the dead that yet stirs the hearts of the living, and if resentment rise with recollection, if anger mingle with grief, why complain? We have given full amnesty to a people, shall we be less forgiving to the instincts of nature? Let us be patient. In the life of a nation, a generation is but as a day—the years but as grains of sand. For us and with us, works the healer—Time. And we may well watch and wait. Watch ourselves, that the power which assures security and brings contentment be not hardened into the oppression that kindles resentment and plants the seed of undying hatred. Let us wait till the years have calmed the passions of strife and soothed the grief of the mourner. Let us hope and strive for the day when our loved country shall be a union of hearts as it is of States; its divisions of North and South like those of the sky, all parts of one broad, unbroken arch, gemmed with stars and radiant with light, proclaiming to all, "Peace on Earth, Goodwill to Men." The lessons of this contest have passed into history—they cannot be mistaken. As we have seen, so those that come after us shall know, that this Republic is as invincible against dangers from within as from without; that this Union is so sanctified in its sacrifices, so endeared in the hearts and hopes of her children, that none shall dare to again call it in question; that in this baptism of blood and flame, this land and this people are consecrated anew to Freedom and Union forever.

This Civil War is not the only trial of republican institutions vouchsafed to this generation. The first year of our second century witnessed a political contest of unparalleled excitement and acrimony, terminating in a disputed Presidential succession. The situation was one of utmost danger. In the traditions of the country, in the written law, no rule for guidance, no solution of this grave question was to be found. The history of the world and the records of other nations were crimson with such controversies. Disputed successions had again and again arisen, and their determination had always been referred to the sword, to the wasting decisions of a civil war. These were the examples the nations had tendered us for our guidance, and they wondered that we did not follow these bloody precedents. The war from which the country had just emerged had tried the strength of the Republic and the constancy of her citizens. This new emergency was to test their patience. With every incentive to passion and madness, with every provocation to disorder and commotion, no threat of violence, no act of turbulence, was heard or seen in the land. The reason of a great people recognized the presence of a great danger, and the biddings of party and the counsels of factions were cast aside. Like the children of Israel, with the sea before and the hosts of Egypt behind them, the people stood still and waited till deliverance should come. They questioned the past for light and guidance and none was found. They commanded that forms be prescribed, and they waited in patience while the law they had ordained and the tribunal they had created resolved this grave controversy. And when judgment was pronounced they yielded unquestioned obedience to the decision. Whether this determination was right or wrong we need not inquire, nor will the future much question. What party or faction failed or succeeded is of little import. The nation won her most glorious victory while her children thus paused, and free institutions triumphed while the people peacefully installed in the Chair of State the President thus selected.

And the cloud that darkened our horizon and presaged danger is even now passing away. For years the Government questioned the capacity of the reconstructed States to properly administer their local governments or fully protect their citizens; and from this distrust had arisen federal interference and supervision more or less active and exacting in certain of the States. This interference was at variance with the American theory of local State Government, and was a source of constant and increasing irritation and danger. Within the past year this cause of discord and disquietude has been removed and the last of the States relegated to her original right of local State Government. There were those who doubted and who still question this policy, but the result promises full vindication of the wisdom of the measure. Under the governments of their own selection, peace, security and prosperity are returning to these war-scourged communities, and by this act of confidence and magnanimity the nation brings the last of the wanderers home. Not with parchment scroll or paper compact; not with the stern voice of the cannon or the sharp bidding of the sword, does she now command allegiance. But with the legions of the free, their swords beaten into plowshares and their spears into pruning-hooks; with the strong links of trade and the potent bands of mutual interests, she is binding them to her and to each other. Not in that ancient league with its sectional feuds and clashing interests, with jealousy in its councils and hatred among its people, with a deadly canker in its vitals and the shadow of a great danger over it, but to the nation, purged and purified, health in its veins and harmony in its councils, united as never before in principle, in purpose and in policy, is the last star of our galaxy restored. Well may we rejoice who this day behold the last of the States, clothed and in her right mind, home again; not dragged a fettered captive at the chariot wheels of the conqueror, but hand in hand and heart to heart with the sisterhood of the Union, journeying on in the pathway of Empire. It is fitting that, with these blessings vouchsafed us, these hopes before us, we this day make of this land one temple for grateful acknowledgments; that forty millions of people do join in one hymn of jubilee. To-day the din of labor and the sound of toil is hushed in the land. The Genius of America speaks, and in reverence we listen. At her coming the storms of passion and the waves of faction are stilled. She summons the past, and the shades of the Fathers rise before us, and the echoes of Independence Hall are about us. She touches the battle-fields, crimson with fraternal blood, and lo! their dark stains kindle and brighten to a blaze of glory. From the scroll of the Fathers she calls the roll of the States, and from ocean to ocean rings the glad response, "We are here, all here!"

Welcome, thrice welcome, bright Genius of American Liberty! Guide of the Fathers and shield of the sons, the people thou hast led through the wilderness and the sea, on this day, in thy promised land of Freedom, renew their fealty and allegiance to thee.

> "Fold the bright banner's stripes over her breast,
> Crown her with star jewels, Queen of the West.
> Earth for her heritage, God for her friend,
> She shall reign over us, world without end."

A TRIBUTE TO THE MEMORY OF JUDGE R. I. BARNETT.

REMARKS BY JUDGE BELDEN, JANUARY 13TH, 1880.

Gentlemen of the Committee and of the Bar:—To the sentiments expressed in these resolutions, to the remarks offered by the Chairman of this Committee and of my associate Judge Spencer, there is nothing that I can add; there is little to be added. These remarks and these resolutions met a quick and full response from all who listened to them. Some suggestions from myself are perhaps befitting the action the Court will take upon these resolutions. My professional acquaintance with our deceased brother, Judge Barnett, was not of as long or as intimate a character as that of most of the members of this Bar. Although a member of this Bar and at one time a Judge of one of the higher Courts of this county, our fields of action were not the same. My personal acquaintance was much fuller, and I ever found him courteous, attentive and efficient. When Judge Barnett first appeared at this Bar he had reached middle life. His success had not been such as he had doubtless hoped and anticipated, and he perhaps felt keenly and painfully that the prizes which often reward honest and earnest exertion had forever eluded his pursuit. But with this of disappointed ambition and thwarted effort he struggled manfully with the duties and the ills of life, true to his every obligation, to his profession, to his family, to society, and to himself. It has been written, "The soul knoweth its own sorrows." What unknown sorrows this man endured we may never know, but to all of us it was known that our departed brother had in his cup of life far more of bitterness than falls to the lot of average humanity. Poverty, sickness, death and domestic calamity were the shadows that walked by him through life and were ever by his hearthstone. That against this deep measure of afflictions he struggled at all was much. That he struggled manfully and hopefully while he did was heroic. He has gone from among us, let us hope, to find that happiness and quiet that seemed denied him here. Though his own hand lifted the curtain that shrouded the hereafter from mortal eyes, let us hope that for this wearied spirit there was the welcome and the reward that greets and crowns those who, though they suffer, yet wait the summons of the Master.

Let these resolutions be spread upon the minutes of this Court. Let a copy be transmitted by the Clerk to the family of the deceased, and the Court will stand adjourned in respect to his memory.

OBSEQUIES OF PROF. NORTON OF THE STATE NORMAL SCHOOL.

ADDRESS ON BEHALF OF THE CITIZENS OF THE STATE BY HON. DAVID BELDEN.

DELIVERED JUNE 28TH, 1885.

Fellow-Citizens, Ladies and Gentlemen:—When the first and startling intelligence came to us that Prof. Norton was dead, those of us who were familiar with his active life, and who knew the varied as well as broad field in which his tireless energies had been exercised, could well foresee who, beyond the members of his bereaved family and circle of intimate personal friends, would first, and would most, lament his loss. We knew that in journalism part of his busy life had been passed, and that ever, far beyond the sound of his voice and the influence of his immediate presence, his pen had been a recognized power in all that could affect the morality or add to the intelligence of the age. We knew, too, the grateful tributes, worthy alike the one departed and those that remained, that journalism would pay to his honored memory. All knew that, as the sincere believer and the earnest teacher of a revealed faith, he had sought to do the bidding of the Master, and to preach as it was given him to understand the principles by which his faith had ever been guided and those doctrines which illumined his own mind. And we well knew that among those from whom he was taken, those who had walked in his companionship, had shared his labors or had profited by his teachings, what cherished memories would be recalled, and what words of sorrowing hope be spoken of the associate gone from their midst—of the teacher who had but passed on before them. In the benevolent orders which had shared his brotherhood, we knew that solemn rite and sad ceremonial, with all that impressive pageantry could bestow, would attest their affection and strive, however vainly, to express the measure of their loss.

In the State institution of learning in which, like the guardian spirit that went forth with Israel from Egypt, he was at once a pillar and a light, we felt the measureless loss and there comes to us the bitter lamentation. We knew that the strong men who these many years had labored by his side, who had felt their toils lightened by his willing arm and their cares lessened by his earnest sympathy and sound judgment, would mourn for him as for a brother; that the youths of his guidance, as they gazed tearfully upon the vacant chair and missed the cheerful greeting, would keenly feel that, in the master, the mentor and the friend, a second father was taken away. We knew that the strains of sorrow that would wail forth from these walls would find a responsive echo from afar, and that from distant lands and from beyond the seas would come the sad requiem of the hosts that had gone forth from his teaching to labor and to strive in the battle of life.

These were the ones—those nearest to him in association, closest to him in sympathy and affection—who we knew would walk closest to his bier and stand nearest his honored grave, and from whom would come all that in language could be expressed of their appreciation of his merits and their deep sorrow for his loss. And as, with silent lips but swelling hearts, men stand beside a waiting grave, their presence the attestation of their sympathy, their silence of a grief too deep for words, it were perhaps best befitting us that in sorrowing silence we should thus take our part in this sad ceremonial. But not to those alone who stood nearest to Prof. Norton was it known that to these associates and associations I have named but a small measure of his useful life was given; that beyond the creed that formulated his own cherished faith there went a spirit of boundless charity that dogma could not fetter nor creed restrain; that labored and loved and hoped for all; its field, the world; its interpreter, all tongues; its aspirations and purposes as broad as humanity, as boundless and far-reaching as the eternity in which he believed and for which he labored. That without as within these walls he was a teacher patient and tireless, whose only question to a world craving for knowledge was, "Where can I best and most instruct this multitude?" That whenever in the interest of morals, of religion, of instruction, or of charity, the world called for a teacher, there came from these lips now silent the prompt and willing response, "Here am I." It is not strange that for such a character there should be mourning throughout the length and breadth of the land; that the household of his mourners should stretch far beyond the bounds of kinship and the claims of blood—a host of friends endeared to him although he knew them not; sorrowing pupils who had been taught only by his own bright example. Is it strange that for such a life, thus dedicated to the universal good, there should be now one universal lamentation? That by a thousand hearthstones that he never saw there should be a grief as though in each his first-born lay dead?

It was for this army of mourners it was thought fitting that some voice should be heard, that these alone should not stand silent and dumb in their general sorrow. And to me has been assigned the sad duty of bringing their tribute to this honored shrine. In what I have already said perhaps that task may be deemed performed. However that may be, I well understand that I can but repeat what all must know and but feebly express what all most deeply feel. My own acquaintance with Professor Norton was of the most casual nature, and my estimate of his character and worth is largely based upon the uniform judgment which attended him living and the unanimous verdict which now follows him dead. But however brief the acquaintance or limited the intercourse one might have enjoyed with Professor Norton, there were characteristics and qualities, so marked and exceptional, that they could not fail to impress themselves upon the most casual observer. A sincere and earnest teacher, as well as laborer in the doctrines of the Christian Church, his was a religion of action and of practice rather than one of assertion or mere precept. Recognizing that within or without the range of the creeds there might be the widest divergence of honest opinion, he never rudely assailed, however radically he might dissent from, the views of others, and though ever ready to defend, and always willing to discuss, he was never the first to enter the arena of polemic controversy or religious disputation. Neither, though his own religious convictions were deep and earnest, did they impart aught of asceticism or gloom to his disposition, nor did he permit those convictions to in any direction restrict his vision or limit the scope of his investigations. Buoyant, cheerful and fearless, he believed that nature and revelation were but the co-ordinate parts of one symmetrical whole, and that this, study and research must finally and fully establish. He neither faltered nor shrank from investigation because of apparent present results or possible consequences. It was in this spirit also that he grappled with those great problems that press upon us all, and that in every age and among all people have commanded the attention of the most subtle metaphysicians and the profoundest philosophers. Those great questions in which the object of a creation, the purpose and the destiny of man were involved, Professor Norton's nature and his training alike invested with the most profound interest. In this investigation his active mind had ranged over and embraced alike those systems of philosophy that come to us with feeble and doubtful rays from the first dawnings of tradition, and the new and bold speculations that were born but of yesterday. Like the warrior of Homeric fame, he asked but for light, and from whatever source it came, he bade it welcome. With the social problems of the day he was equally earnest and equally able. Whether society was indeed organized upon the best possible basis he did not hesitate to discuss or to question, and while he admitted the evils and foresaw the convulsions through which the remedy might come, with an abiding faith in humanity and in the purposes of an All-wise Ruler, he felt and knew that beyond the clouds, the darkness and the tempests of the day or of the future, the march of humanity would be found to have been ever onward and upward. It was not, however, in the discussion of purely moral or social problems that Professor Norton was best known. Of a singularly inquiring nature, no field of possible attainment was left unexplored, no fact by which men might be instructed or advanced passed unquestioned. If in all this varied research there was one subject more than another congenial to his mind, it was perhaps that of natural philosophy—the contemplation of those laws of mechanics which man strives to utilize for his own purposes, and those vast powers which, acting through measureless periods and boundless space, guide and control the movements of the universe. In these investigations, alike of the majestic and the minute, he ever delighted. It was of Nature and her laws, ever and in everything infinite, that he was the tireless seeker and searcher. Alike inquiring and fearless, whether the fields he traversed were the confines of space—those vast abysses where the vapor-mists but shadowed forth the birth of future systems and of worlds yet to be—or the infusorial host that the microscope gave in the drop of turbid water, each and all alike his eager mind laid under contribution; from each and all he returned laden with the rich tribute paid to his exertions.

I have said that he was greedy only for knowledge; that there he was omnivorous, insatiate and exacting. And this is so. But his was not the greed of the miser who but acquires that he may retain, or even of the scholar who learns that he may know. Whatever of labor, of toil, or of research Professor Norton may have expended in acquiring, he was equally lavish and prodigal in bestowing upon others, and he gathered with tireless industry but that he might more liberally scatter abroad. Few indeed there are to whom the talent entrusted by the Master has been returned with more of usury than in the rendered stewardship we now deplore. It has been by many thought, and perhaps by some said, that had he been less universal in his efforts, had he confined his labors to some single branch of science or of knowledge, he might have accomplished more. Perhaps in the achievement of individual fame or personal aggrandizement this might have been so. There lies on the outskirts of the domain of knowledge a realm of obscurity and of doubt which it is vouchsafed but to the favored to enter. To the mass of mankind of every generation this is, and ever must be, a *terra incognita*. Within, far within this line, are the hungry hosts that are to be instructed and fed, and here he who would teach most as well as best must take his stand. This was the field of Professor Norton's most assiduous labors. He knew that it was to the multitude that were by the Sea of Galilee and not to a favored few that the loaves and fishes were distributed, and to him, to do the most, was to do the greatest good. It has been said, and deploringly, that had he been more considerate of himself he might have been yet spared to us; that it was by constant and unremitting toil this life, so priceless, has been ended. That this is so, it is not given us to know. Fate and destiny meet us in places we cannot foresee and upon paths we may not avoid. Could we indeed have full assurance that with less of labor there had been more of life; could we know that it was indeed the harness of the warrior that crushed the soldier; the toil and labor of the strife that had brought this end, why should we mourn this as a cause? Life and its best achievements are not the mere measurement of years or the prolongation of existence. Weigh in the scale of fifty years the toils, the efforts, the accomplishments of the man, the much that he has done—the much, by precept and example, he has encouraged others to do. Compare this with the record of the Patriarch of the world, and judge which is the largest, the fullest, aye, the longest life. "And all the days of Methuselah were nine hundred and sixty-nine years, and he died."

I have spoken longer than I had purposed, and yet far less than the occasion invites, and I hasten to conclude. It is fitting that to this life, whose every utterance was an instruction, whose every thought an aspiration, its every purpose a beneficence, this tribute should be offered. That within these walls, which yet echo to his voice and still speak his presence, these honors should be paid. That by the community that witnessed his labors and knew his worth, this sad but grateful recognition of his merit should be bestowed. And that in his own loved "Skyland," with a mountain for his mausoleum and the ocean at his feet; with the winds and the sea chanting in eternal melody his requiem; with his own good deeds as a monument heaped high upon his grave, the little of such a life that can die be laid to rest forever.

THE SANTA CLARA VALLEY.

CONTRIBUTED TO THE "OVERLAND MONTHLY" IN 1887.

To the visitor approaching the Valley of Santa Clara, each mile traversed ushers in some delightful surprise—introduces a new climate. If his advent be from the north, the hills of scanty verdure which encircle the bay recede upon either hand, assume a softer contour and a richer garb. The narrow roadway that skirts the salt marsh has widened into a broad and fertile valley that stretches as far as the eye can reach in luxuriant fields of grass and grain. Bordering this verdant plain, in hues and splendors all their own, come the hills, and into the recesses of these hills creep the little valleys; and as they steal away in their festal robes they whisper of beauties beyond, and as yet unseen.

In full keeping with the transformed landscape is the change of climate. The harsh, chill winds that pour in through the Golden Gate and sweep over the peninsula have abated their rough vigor as they spread over the valley, and, softened as they mingle with the currents from the south, meet as a zephyr in the widening plain.

If the approach is from the south, the traveller, wearied with the desert and its hot dry airs, is conscious of a sudden change. The sterile desert has become a fruitful plain; and the air that comes as balm to the parched lungs is cool and soft, and moist with the tempered breath of the sea. Upon every hand, and to every sense, there is a transformation that would scarce be looked for outside Arabian romance.

If it be spring or early summer, miles upon miles stretches the verdant plain; over it troop sunshine and shadow; across it ripple the waves. Summer but changes the hue and heaps the plain with abundant harvests, while the first rains bring again the verdure and the beauty of spring. "An ocean of beauty," exclaims the charmed beholder; nor is this comparison to the sea altogether an idle fancy.

At a period geologically recent, the Sierra Nevadas and the Coast Ranges of mountains inclosed a basin about four hundred and fifty miles in length by about forty in width, comprising the present valleys of the Sacramento and San Joaquin rivers. During the same period the region east of the Sierras, now embraced in the State of Nevada and the Territories of Utah and Arizona, was an inland sea, connected with the Pacific by straits and inlets. The evaporation from this body of water affected materially the climate of the adjacent regions. Lowering, as it must have done, the general temperature, and increasing the humidity, it induced precipitation from the saturated winds of the Pacific, while from its own evaporation it added materially to the rainfall it thus invited. From these causes, the precipitation of that period, both as to volume and duration, must have been greatly in excess of the present and vegetation must have been correspondingly more luxuriant. From the slopes of the mountain ranges the waters flowed southerly in a majestic stream, forming broad lakes as the basin widened, a river where the narrowing valley restricted its borders, until, passing through the bay of San Francisco, and the present valleys of Santa Clara and Pajaro, it found an outlet in Monterey Bay. In the era that measured the existence of this ancient river it had borne in its turbid waters the disintegrations of the regions it traversed, and in the ooze and slime of the lakes that intercepted its course and stilled its current was the decaying mold of generations of forests that had flourished on its banks.

At a later geological period—probably the Quaternary—there was an upheaval of the southern part of this basin, its axis probably being near the present course of the Salinas river. With this rise came a depression in the bay of San Francisco. The drainage was now to the north. The Coast Range was broken through at the Golden Gate, and the waters of the great basin found there their outlet to the sea; while the former lakes, uplifted and drained, were transformed into fertile plains. During the same period, the sea that lay to the east of the Sierras was cut off from the Pacific. The evaporation of this now land-locked basin was in excess of the rainfall, and gradually these waters receded, until to-day Salt Lake is the remnant of that inter-ocean which once extended through thirty degrees of latitude, and from the Rocky Mountains to the Sierras. This, the recent history of these regions, the geological records upon every hand, fully attest—here by beds of water-worn pebbles, by strata of clay (always the deposit of quiet waters) that underlie the whole valley, by the trunks of trees that the drill of the well-borer discovers hundreds of feet beneath the surface, and by the vast deposit of vegetable mold that forms everywhere the surface soil of the valley; while to the east mountains of marine shells and fossils, vast beds of salt, beach lines upon the slopes of mountains, attest the existence of the sea that left these proofs of its presence, and wrote with its fretful waves the story of its long companionship upon these rugged cliffs, and then shrank from them forever.

With the subsidence of this sea, there came that change in climate which now characterizes this coast. The vapors from the Pacific were now absorbed by the dry air of this region, and the precipitation which the sea had promoted the desert now prevented. The classification of these seasons as wet and dry often misleads—for while the latter is all that the term implies, the rainy season has as much of sunshine as of storm, as the records abundantly show. A brie epitome of these seasons and the attendant phenomena will be given.

Beginning with the month of October, the signs of a coming change are apparent. The winds, no longer constant and from one quarter, become variable both as to direction and force, or wholly cease. Sudden blasts raise miniature whirlwinds of dust and leaves, which troop over the fields, and the stillness of the night is broken by fitful gusts and the sudden wail of the trees as the breath of the coming winter sweeps through them. These are the recognized precursors of the season's change, and are usually followed in the first ten days of October by an inch or more of rain; and this usually by weeks of the finest weather. The effect of these first rains is magical. The dust is washed from the foliage, and is laid in the roads and fields. The air has a fresh sparkle and life. The skies are deeper azure, and the soft brown hills seem nearer and fairer than before. It is the Indian summer of the East, but instead of the soft lassitude of the dying year, here it comes with all the freshness and vigor of the new-born spring. If in this and the succeeding months there are further showers, the grass springs up on every hand, and the self-sown grain in all the fields. The hills change their sober russet for a lively green. Wild flowers appear in every sheltered nook. Hyacinths and crocuses bloom in the gardens, and the perfume of the violet is everywhere in the air.

In the latter part of November the rainy season is fully established. A coming storm is now heralded by a strong, steady wind, blowing for a day or two from the south-east, usually followed by several days of rain, and these succeeded by days or weeks without a cloud—and thus alternating between occasional storms and frequent sunshine is the weather from October to April—the rainy season of California. The amount of rain that falls varies materially with the locality. In San Jose it is from fifteen to twenty inches, while in places not ten miles distant twice that amount is recorded. During this period there are from thirty to forty days on which more or less rain falls; from fifty to seventy that are cloudy; the rest bright and pleasant. These estimates will vary with particular seasons; but taking the average of a series of years, it will be found that from October to April one-half the days are cloudless, and fully three-fourths such that any out-door vocation can be carried on without discomfort or inconvenience. Cyclones and wind-storms are wholly unknown, and thunder is heard only at rare intervals, and then as a low rumble forty miles away in the mountains.

With the month of March, the rains are practically over, though showers are expected and hoped for in April. Between the 1st and 10th of May there usually falls from half to three-fourths of an inch of rain. Coming as this does in the hay harvest, it is neither beneficial nor welcome. By the 1st of July the surface moisture is taken up and dissipated, and growth dependent upon this ceases. The grasses have ripened their seed, and, self-cured and dry, are the nutritious food of cattle and sheep. The fields of grain are yellow and ripe, and wait but the reaper. Forest trees and shrubs have paused in their growth. This to the vegetable world is the season of rest. This is the winter of the Valley of Santa Clara—winter, but strangely unlike winter elsewhere, for here man has interposed. Here, by art and by labor, he has reversed the processes of nature, and constrained the course of the seasons. In gardens bright with foliage and resplendent with flowers, there is spring in its freshness and beauty; while in orchards teeming with fruits, and vineyards purple with ripening grapes, summer and autumn vie for the supremacy. And so, with changing beauty and ceaseless fruition, pass the seasons of this favored clime.

If in these seasons the resident or the visitor finds but one succession of enjoyments, to the farmer and fruit-grower they are of the utmost practical importance as well as convenience. Those months that in the East preclude all farming operations are here the season of the most active industry and preparation. With the rains of November plowing and seeding begin, and continue with but little interruption to the 1st of March. If the rains are continued to late in the spring, the later sown fields are usually cleaner crops and of superior quality, while without these later rains, the earlier sown is likely to be the most successful. It is in the harvesting, however, that the advantages are the most apparent—an advantage hardly understood elsewhere and scarcely appreciated even here. Here the favored farmer gathers his matured crop with no possibility of rain interfering, and with no thought of the storms that elsewhere make this a season of severest toil and constant anxiety. His hay, as he cuts it, falls upon soil as dry as is the air above it, and is cured without further handling or labor than to collect it in cocks and stacks.

The grain, matured and dry, waits without waste or detriment for weeks or months for the reaper, and in October—and often far into November—the hay pressers and threshers may be seen busy with the hay and grain that has remained in cocks or stacks for the past five months.

For the fruit-grower these seasons are even more favorable than to the farmer. To the visitor the thousands of acres of orchard and vineyard without a weed or blade of grass to be seen would represent an apparent amount of labor and culture absolutely appalling—and so it would be—not merely appalling, but quite impossible under the climatic conditions of other regions.

In sections where frequent rains, constant humidity, come with the summer, the seeds of every form of weeds ripen with every week of sunshine, and germinate with every shower, and the surface moisture usually favors their continued growth and development, and the only possible conditions for successful tillage are those of constant warfare with weeds.

Here the seeds near the surface germinate with the winter rains, and are turned under and destroyed with the first plowing.

The surface dries for a depth of three or four inches at the commencement of summer, and so remains through the whole season. In this dry soil it is impossible for seed to germinate, or plants to live. Anyone who has ever attempted to start seeds in the summer knows how indispensable constant moisture is, and will readily understand how effectively this feature of the climate co-operates with the cultivator, and preserves to trees and vines all of the moisture and nutrition that the soil contains.

The Californians' estimate of the climate of their State has been the theme of much facetious comment. In view of the fact that elsewhere those who are able spend half the year on the St. Lawrence or the Coast of Maine, to escape the heat of summer; and the other half in Cuba, Florida, or on the shores of the Mediterranean, to avoid the rigors of winter; that, in fact, most of their lives are migrations in search of climate—the residents of this State may accept with equanimity the badinage of these birds of passage, and may well felicitate themselves upon those conditions that bring to their very door the summer of the Thousand Isles and the winter of the Antilles.

That this is not an exaggeration is easily shown. Thermometrical records, however accurately kept, are quite apt to mislead those who seek to deduce from these practical results. There are many important conditions not expressed in these observations. It is well understood that from the dryness of the air, forty degrees below zero is more tolerable in Dakota than thirty degrees higher in the humid air of the Atlantic seaboard; and for the same reason, and almost in the same ratio, as to heat. It would be but little consolation to a person to know that some thousands of miles away the temperature from which he was suffering would be quite endurable. So as to averages, which usually form a conspicuous feature of these records. It is not from the averages, but from the extremes, that men suffer and vegetation dies. Nor do even the extremes represent the effect—their continuance is important. A plant often survives a severe frost, and then succumbs to a much lighter repetition; and a degree of heat which may be endured for a day, becomes intolerable when continued for several. In view of these well recognized facts, I propose to present the question of temperature as shown by effects, which are readily appreciated by all, rather than from compilations of figures thus liable to mislead.

The rains of October are usually followed by frosts sufficiently sharp in the lowlands of the valley to kill the more delicate plants. During the months of December, January and February these frosts are more frequent and severe. Every variety of grapes, figs, olives—in short all the semi-tropical plants—remain unaffected by the frosts. Callas, fuchsias, geraniums and heliotropes, when grown by the wall of a house, in the shade of an evergreen, or given the slightest covering, flourish and bloom through any winter, and in many seasons do so without any protection whatever. As a rule, however, where exposed, the tops of these plants are killed; the roots remain unaffected, and by the middle of April the new shoots are again in bloom. Every known variety of rose flourishes without the least protection, and not only do they retain their leaves, but there is not a day in the winter when blossoms, hardly inferior to those of June, cannot be gathered in the open grounds of any garden. The lemon verbena shrub here attains a height of from ten to twenty feet, with a trunk from two to ten inches in diameter. Bees increase their stores during the rainy season, and every clear day humming-birds and butterflies appear in the gardens. For personal comfort fires are usually started in the morning, die down toward noon, and are rekindled for the evening. As little fire as can be kept burning usually suffices for comfort. There are days, stormy, damp, or cold, when more fire is required. Such days are the exception, however, and the rule is as stated. Within the last twenty years snow has fallen in San Jose on three occasions. In no instance was it over three inches in depth. It disappeared before nightfall of the day on which it fell, and its presence transformed the usually staid and orderly city into a snowballing carnival.

In the dry season, beginning with April, the mornings are clear, calm, and not unpleasantly warm. About noon a brisk breeze from the bay blows down the valley. This, harsh as it sweeps in through the Golden Gate, is soft and mild here. It goes down with the sun, and the night that follows is calm and cool. A high light fog sometimes hangs over the valley in the morning, but disappears by 8 or 9 o'clock.

During the summer months three or four heated terms may be expected. These are usually in periods of three days, and the thermometer indicates from 90 to 95 degrees Fahrenheit. Upon the morning of the fourth day a fog generally appears, a cool breeze springs up, and the former temperature is restored and maintained for weeks before another heated term. As these periods are the extreme of the season, some *indicia* will be given by which they may be understood and estimated. Through a part of these days exposure to the sun is disagreeably hot, but not dangerously so. Under the shade of a tree, or in the shelter of a well-constructed house, it is perfectly comfortable. The evenings that follow are so cool that persons rarely sit upon the porches of their houses, and a pair of blankets is required for comfort while sleeping.

Summarizing, it may be said that, in any part of the year, days too hot or too cold for the comfort of those engaged in ordinary out-door vocations are rare, and that a night uncomfortably warm is absolutely unknown. It may be added that the fears and forebodings with which the seasons are elsewhere greeted are here unheard of; coming with no rigors, they bring no terrors, and are alike welcomed by all, not as a relief, but as a change. In these conditions health and personal comfort are largely subserved, and also in them the horticultural possibilities, of which we are to-day but upon the threshold, are assured; and these, the elements of present and of prospective prosperity, are as constant as the ocean currents in which they have their origin, as permanent as the mountain ranges which bound the field of their exhibition.

The County of Santa Clara has an area of rather less than one million acres. Of this, about 250,000 acres is valley—the ancient lake bed, or the alluvial deposits of existing streams; 300,000 acres is rolling hills and mountain slopes, well adapted to fruit; the residue, valuable principally for pasturage. While the general contour presented by the valley is that of a level plain, it is in fact a series of gentle undulations, with marked variations in the quality of the soil. In what are now, or have recently been, the lower portions of this plain, the soil is a black, tenacious clay, known as "adobe." It is very fertile and productive, but requires much care as to the time and manner of cultivating it, and is well adapted to hay and grain. The higher lands of the valley are a light loamy, and sometimes gravelly soil. This is easily cultivated, and is well adapted to all the cereals and to most varieties of fruit. In the vicinity of the bay, there are many thousand acres of salt marsh. No effort worthy the name has been made to reclaim them, though the task would seem a not difficult one. It is safe to predict that at no distant day these lands will be reclaimed, and among the most productive and valuable in the county. The warm belt is a tract upon the slopes of the hills that environ the valley. It has an altitude of from two to eight hundred feet. It is generally—and in some localities wholly—free from frost. In this belt, to the east of Milpitas, potatoes, peas, etc., are grown through the whole winter for the San Francisco market. Upon the Los Gatos and Guadaloupe Rivers are some hundreds of acres, formerly dense willow thickets, but now in the highest state of cultivation. These lands are regarded as the most desirable in the valley. The soil is a sedimentary deposit, easily cultivated, requiring but little irrigation, and producing every variety of fruit and vegetable.

Thirty miles south of San Jose is the town of Gilroy. The soil of the valley is here fertile and productive. Over a considerable portion the subterranean moisture maintains the growing pastures throughout the year, and some of the most successful dairies in the State are here established. The more elevated parts of the valley and the slopes of the hills are well adapted to fruits and vines. The summers of Gilroy are warm and drier than in San Jose. The cool winds from the bay are materially softened as they sweep down the valley, and the differences of temperature between the day and night are not so marked. The air is mild and balmy, and the nights agreeably cool and pleasant.

The watercourses within the county greatly diminish, when they do not wholly disappear, in summer. Sinking as they approach the valley, they augment the subterranean resources which supply the artesian wells. These are found all over the valley. They are usually from sixty to one hundred feet in depth, though some find a larger and more permanent supply at a much greater depth. The water is raised by windmills into tanks, and is ample for household and gardening purposes. About Alviso, and near the bay, hundreds of acres of strawberries and of vegetable gardens are irrigated from these wells, and the water rises to the surface with such force that the most massive appliances are required to restrain the flow.

Of the varied productions of this valley it is difficult to speak in terms which shall not savor of exaggeration. The question is no longer what can, but what cannot, be successfully produced. With the early settlers cattle were the staple, and of the vast herds which roamed over the country, little more than the hides and tallow were utilized.

The cereals, it was supposed, could be grown only in the summer, and where irrigation was afforded. The gold discovery changed all this. It furnished not only a market for the cattle, but soon after it was ascertained that the rainy months were the season of growth, and that wheat sown with the early rains matured enormous crops of the finest quality.

The success which attended this last industry relegated the cattle interest to the extensive and less valuable ranges eastward, while the prodigal quantity and superior quality of the wheat produced enabled it, not only to successfully compete with all rivals in the markets of the world, but to fix for years the price of the bread of a hundred millions of people.

As the herdsman has given way to the tiller of the soil, so the latter, and for the same reason, has made way for a more profitable industry—the growing of fruits. That this has not long since supplanted all other industries was not from any doubt as to either production or quality, but simply as to transportation. This problem satisfactorily solved, and the fruit-growers of this valley can have no successful rivals. To-day, with this industry comparatively new—its means of transportation a monopoly—its markets but recently found, and its methods of reaching these markets an experiment; with all these to contend against, the fruits of this valley are as well known and highly esteemed in the markets of the East and of the world as are those of Sicily, Asia Minor and the Adriatic, where ages have been given to the industry—where skilled labor is at the very lowest stage of compensation, and the ocean is the easy pathway to a world of consumers. The capacity of this valley in this direction is no new discovery. It is as old as its settlement.

A hundred years ago the Mission Fathers introduced the grape which still bears their name and perpetuates their memory, and orchards of pear and of olive, coeval with these vineyards, still bear abundantly, and attest alike the capacity of the region and the judgment and forethought of those who thus demonstrated it, while the older records make frequent mention of planting and vintage, the fruits and the harvests of these ancient days. But neither record nor relics is needed to show the varied capacity of this region. The valley upon every hand is to-day exhibiting it. By the side of his fields sown to grain or in grass, the farmer plants an orchard or vineyard; between the rows of trees or vines he tills and plants as before, and gathers full harvests of roots, etc., while waiting the fruition of his trees. His labors alternate between his fields of grain and of vines, and his teams are to-day transporting from his farm tons of hay for the market, and tons of grapes for the winery. Nature, in everything prodigal, is in nothing invidious, and were the fruit production to absolutely cease, the valley would remain one of the richest agricultural regions of the globe.

I have referred to the wheat production, still successfully continued, except where supplanted by some more profitable product. Its hay crop is to-day the principal supply of the San

Francisco market. In the vicinity of Santa Clara are fields of corn that never felt rain, nor knew irrigation, and that will compare favorably with the crops of the valley of the Mississippi, while beside these, whole farms are growing garden seeds, which have long commanded the highest prices in the Eastern markets.

Extensive hop yards were established, and the vines grew and bore luxuriantly, and only the high price of labor prevented their being to-day a staple of the valley. Near Gilroy some of the most extensive as well as successful dairies in the State are established, while in the Santa Cruz Mountains, upon the west, petroleum is found, and its further development is being prosecuted with every prospect of success.

Of the fruit product of this county it is impossible to speak accurately—difficult to speak instructively.

At the present writing enormous canneries, employing thousands of laborers, are running night and day. Drying apparatuses upon every hand and in almost every field are employed, while in every direction acres upon acres are covered with bags of fruit preserved by drying in the sun—every resource of labor or of mechanism is tasked to the utmost, and even the school vacation is extended, that the children may aid to preserve the enormous crop; and with all these efforts, thousands of tons of fruit and of grapes are annually lost for want of labor and appliances to gather and to utilize them.

While to the laborer this vast and increasing production gives assurance of continued and remunerative employment, to the grower, not merely in the labor attainable, but in the effect of this vast supply upon the market, a very grave problem is presented.

The orchards in bearing are generally increasing in their yield, and will continue so to do for many years; while extensive areas are coming into bearing, and the planting of new orchards and vineyards is constantly going on. In fact the system of summer culture, which renders irrigation unnecessary, makes all the arable land in the county available for fruit. In view of these facts, estimates would be but the merest of conjecture. One thing may be said—that all fruits of the temperate zone and most of the semi-tropical fruits are now grown in the greatest perfection, and in quantities which tax to the utmost the resources and labor attainable to gather and preserve them. Orange trees have been grown for many years in this county (in San Jose more for ornament than for fruit), generally seedlings, and with no care as to either selection or culture. In the vicinity of San Jose, considerable groves have been growing for twenty years, producing abundant crops of well-flavored fruit. The citrus fairs held last year in San Jose and other places showed the very extensive sections where these fruits were being successfully grown; and this, with the stimulus of a market, has induced the planting of orange trees throughout the warm belt in this county. That these trees will grow and luxuriantly, and that they are not affected by the frost, is established; and that certain varieties will mature excellent fruit seems more than probable. If, however, it shall be found wanting in the flavor or qualities of the oranges of Tahiti or Florida, it is because it does not have the long hot season—the burning days and sweltering nights—of those countries. I question whether it would be desirable to accept that climate, though with it we could secure this single production.

The great and increasing extent of the fruit production, the fact that over much of the State it is being prosecuted with energy, suggests the frequent inquiry, "Where is the future market for all this to be found?" This is the inquiry that at some stage of development confronts every form of industrial enterprise, whether the product of the soil or the result of manufacture. The subject is too extensive and too intricate to here receive but the briefest consideration. The fruit product of this State is the result of special climatic conditions existing within restricted limits. Unlike manufactures, this form of production cannot be extended by either art or enterprise. Upon the other hand, the consumers will be found wherever any industry can be maintained, or men exist. If, then, fruit production shall increase in geometrical ratio, nature has fixed the limits within which this progression must cease, while no such bounds exist to the range of consumption. Farther than this, experience and invention are constantly diminishing the cost of production, and thus enlarging the class of consumers. If wheat and wool, staples of the world, and everywhere grown, are rarely found in excess of profitable production, it may fairly be assumed that these special products of California, thus limited as to area and restricted as to conditions, will be always a profitable industry. The question, however important, is at present one of speculation, and time alone can give the full solution.

Dependent as this region is upon the regular rains of winter, the knowledge that these sometimes fail makes the subject of rainfall one of much anxious consideration. There is a theory that the seasons move in cycles of twelve years, passing by regular gradation from a maximum to a minimum rainfall in that period, and culminating in a season of floods at one extreme and of drought at the other. The observations of the last few years do not fully support this theory of a gradual transition, although records extending back to the year 1805 seem to indicate that the twelfth year is deficient in rain. Should these dry years recur in the future, the disastrous and destructive consequences of the past are not likely to follow. The industry of the State was then cattle raising, and the country was stocked to its fullest capacity. With the drought, the short-lived natural grasses failed, the watercourses dried up, and as no provision was made for supplying either, the cattle perished by thousands. At present the land is more profitably utilized in other pursuits, and cattle are comparatively few, and for these, some provision can be made. Trees and vines, though their product may be diminished, are not destroyed by a drought, however severe. Large areas of irrigated lands will furnish vast supplies of forage food, and the reclaimed sections contribute in the same direction, while railroads transport these products as needs may require.

A further consideration—the possible effect of artificial conditions upon rainfall—may be worth estimating. It has been often asserted that the cutting off of the forests of the Sierras and the Coast Range would diminish the rainfall, and in other ways prove detrimental to the moisture supply. If this as a consequence of such denudation follows anywhere, it may be doubted whether it does here. In almost every instance the removal of the timber is followed by a dense growth of young trees, or of thicket, and the effect of this, either as inducing precipitation or retaining moisture, must be fully equal to that of the larger, but scattering, trees thus replaced. Further than this, in the Valley of the San Joaquin, hundreds of square miles of prairies and plains are now, by irrigation, thoroughly saturated, and from waters that had their former evaporation surface in the area of a comparatively small lake. On the slopes of the Sierras the same causes are at work. Water stored in immense reservoirs is conducted in canals to thousands of acres of orchards and of vineyards. These causes, large at present, and constantly enlarging, cannot but produce some effect upon the rainfall of this coast. Regions that before absorbed the moisture, now by their own evaporation contribute to it, and induce precipitation. If it be argued that these causes are inadequate to the results suggested, it may be replied that forest and prairie fires, the burning of cities, the firing of cannon, are known to be followed by copious rains. The meteorological conditions that accompany a saturated atmosphere are often very nearly in equilibrium, and a very slight disturbing cause may determine for or against precipitation. The causes I have indicated are neither transitory nor insignificant. They embrace areas equal in extent to States, and are affecting in a marked degree the temperature and climate of these extensive regions. If any consequences shall follow from these changes, every reason seems to indicate they will be found in an increased rainfall, and against the recurrence of drought.

The population of the county is about 45,000; its assessed valuation, $40,000,000. By the subdivision and sale of the larger tracts, population, improvement and values are rapidly advancing.

In this description of the capabilities and climate of Santa Clara Valley, I have substantially described San Jose—for this is her environment, these are her resources, this the rich setting of which the "Garden City" is the central gem. San Jose is located in the heart of the Valley of Santa Clara, fifty miles south of San Francisco, and eight from tide water at Alviso; and is ninety feet above the level of the sea. Its political existence began in the establishment by a party of Mexican soldiers in November, 1777, of the Pueblo of San Jose de Guadaloupe; while in the same year the Franciscan Friars established in the same locality the Mission of Santa Clara. The growth of the place, as shown by the records, was slow, and its history uneventful until the Mexican war, when it became the theatre of some adventures connected with the occupation by the Americans of the country. With the gold discovery the quiet pueblo assumed a new life. The hosts of emigrants drawn hither from every part of the world could not be insensible to the advantages and attractions of this section, and population and improvement increased rapidly. In 1849 it was made the capital of the State, and the legislature of that year here convened. From that date there has been a steady and sustained increase in population, wealth and improvement, and to-day San Jose is the fifth city in the State, and numbers a population of 20,000, with an assessed property valuation of $11,000,000.

The streets of the city are broad; the roadways a solid, smooth and compacted bed of gravel and clay; the sidewalks wide and well paved. The business portions of the town are of brick, substantial and sightly. Its water supply is from a stream in the Santa Cruz Mountains, and is fine and abundant. The streets and squares are lighted by electricity. Gas is generally employed for interior illumination. A sewer of the most improved plan and durable material, and of a capacity for a city of a million inhabitants, traverses the city at a depth of from twelve to twenty feet, and connects with tide water near Alviso.

The educational facilities of San Jose are of the highest order. There are five common school buildings conveniently located throughout the town. They are constructed in the most thorough manner as to security, convenience and architectural beauty, and at a cost of from $12,000 to $20,000 each, and furnish all the accommodation required. The schools are open through the whole year, and are maintained in the very highest state of efficiency. Very many families from abroad make their residence here for the advantages afforded by these schools for the education of their children. The Normal School, maintained by the State, has an average pupilage of over four hundred. The edifice is an imposing structure, built of brick, and stands in the centre of a tract of thirty acres, donated by the city to the State. The extensive grounds are to-day a garden of flowers. With a few years' growth for the trees, this plat will be a stately park of the future. The Convent of Notre Dame, under the charge of the Sisters of that name, is located in the heart of the city. Its grounds are extensive and maintained in exquisite order, and its buildings capacious. Here from two to three hundred scholars from every part of the coast are to be found, and the reputation of the school is second to none in the State. In Santa Clara a flourishing school is conducted by the Jesuit Fathers. Pupils are here received without distinction as to creed. The thoroughness and practical efficiency of the methods here pursued is evidenced by the fact that among its graduates are to-day to be found leading men of the State in every walk of professional and political life. Less than two miles to the north of San Jose, and connected with it by pleasant drives and street cars, is the University of the Pacific, under the special patronage of the Methodist Church. Here, also, students are received without distinction as to creed. It has at present over three hundred students, and the attendance is steadily increasing. The thoroughness which has always characterized its management, and the liberality exhibited by members of this church, assures its position among the first of the educational institutions upon this coast; and the well-kept grounds, green hedges and groves among which the buildings are placed, present a sylvan scene of singular attractiveness. Twelve miles to the north is the proposed site of the university established by Governor Stanford, in memory of his son. Here nature seems to have exhausted herself in embellishing what is yet to be crowned by art. The forethought of the founder has already secured the establishment and maintenance of this institution beyond any contingency, while his munificent endowment places it in resources in the first rank of educational institutions; and the executive ability and energy of its projector guarantee the speedy and thorough accomplishment of his plans. Alike as a memory or a benefaction, the Stanford University is destined to stand first among the foremost on the scroll that bears the names of Yale, of Harvard, and of Dartmouth, and the venerable universities of the Old World.

All the creeds of the world, Christian and pagan, are represented in San Jose. St. Joseph's Church upon Market Street is one of the most substantial and beautiful church edifices in the State. It is in charge of the Jesuit Fathers, who here exhibit all the administrative ability which Loyola impressed upon his order, the fervid zeal which burned in Xavier, the "Apostle of the Indies." Among the larger of the religious societies are to be found the Episcopal, Methodist, Baptist, Presbyterian, Congregational and Hebrew.

These church edifices are upon the principal streets, are commodious within and ornamental without. The societies are flourishing, their members earnest and active. Professing distinctive creeds, they yet exhibit no spirit of bigotry or intolerance. In financial enterprises they cheerfully assist each other; in every effort looking to the advancement of general morality or the public good, all—pastors and laymen—are found in full and earnest co-operation. Sunday is here observed, as in most Eastern cities, as a day of rest; secular business is suspended, and a large proportion of the population attend some place of public worship. The excursions from abroad which often on this day visit the pleasure grounds of the vicinity pass through the streets in orderly silence, constrained thereto as much by public sentiment as by positive ordinance.

The roads of San Jose and vicinity are wide, well graded, and ballasted with gravel and rock, of which there is an inexhaustible supply in the immediate vicinity. Unaffected by frost or flood, they improve with use and require but little attention to maintain them in the finest condition.

Each year adds many miles to the hundreds of miles now in use, while the trees with which most of them are bordered are rapidly developing them into stately avenues. These roads as they extend into the country are little affected by either the rains of winter or the droughts of summer, and delightful drives, free from either mud or dust, are to be found in every direction and at all times. The residents thoroughly appreciate and fully avail themselves of this attractive feature of the county, and probably in no place in the country are so many teams to be found driven with perfect confidence, not only by women, but often by the merest children.

To the visitor who drives at random over these roads, every turn brings a new surprise, reveals a new beauty. Now the road is through an avenue of stately trees; then comes a succession of gardens; and again it is the abandoned channel of a former stream, where giant and gnarled sycamores and old oaks shade the way; and then for miles a bewildering succession of vineyards, orchards, and fruitful fields; while everywhere, half hidden in the orchards, nestling among the vines, embowered amid the roses, stately mansions and beautiful cottages bespeak alike the thrift and refinement of their occupants. When the stranger thus finds each day, and for months, a new avenue, with new beauties before and about him, he will give credence to the assertion that here are to be found more delightful drives than in any other city of the State, and will declare it fitly named the "Garden City."

Of the hundreds of miles of these drives, which lead in every direction, some are deserving of more than this general mention. The Alameda, a broad and beautiful avenue leading to Santa Clara, is three miles in length, as level as a floor and shaded by trees planted by the Mission Fathers a hundred years ago. Bordered through its whole extent with beautiful residences, it puzzles the passer-by to know where San Jose ends and her sister city begins. Another notable drive is to Alum Rock, a distance of seven miles, over a road as perfect as art can make it, through a deep gorge with a prattling stream keeping company, to a natural park of four hundred acres, owned by the city. Here in a sheltered nook a comfortable hotel, shaded by mighty oaks, is kept, with mineral springs of every quality and every temperature bubbling up in every direction. Scarce a day in the summer that a party is not found picnicing in this park, and making the hills ring with music and merriment. To the west, within a dozen miles, is the Almaden quicksilver mine, employing three hundred laborers, and supporting a population of a thousand; a place interesting as being the richest deposit of cinnabar on the continent, or perhaps in the world, and also for a thorough system and scrupulous neatness exhibited on every hand. Another drive is to the Guadaloupe, second only to the Almaden; another to Los Gatos, where all the zones and all the seasons seem to have combined to crown this favored spot with the choicest treasures of them all; another to Saratoga, with its soda spring, unsurpassed in the State, gushing from the hillside; to Lexington, last of this triad of mountain beauties; and everywhere—in the little valleys, garlanding the hillsides, climbing to the very summit of the mountains—orchards, orange groves and vineyards.

The drive into these hills is always delightful; but it is in the spring, when everything is in bloom, that it appears in all its glory. Then, as far as the eye can reach, hillside and plain are decked in all the splendors of the rainbow. Here the white blossoms of the prune sway in the breeze like drifting snow, while beside these, the valley is blushing with the dainty hues of the apricot, the peach and apple, and the vineyards are upon every side in their delicate green. It is in fact one vast parterre of floral beauty—its coloring by acres, and stretching away for miles, until the distant hills frame in the gorgeous picture. In all these mountain villages are to be found hotels, cosy and pleasant, and as the guest sits in the evening upon the porch and sees the lamps of the distant city twinkling like fire-flies below him, with the electric lights gleaming like planets above them, with the soft, dry air that stirs but in zephyrs, he can but feel that this is indeed an earthly elysium. In the morning a striking sight sometimes awaits the visitor. The sky is blue and cloudless as ever, but the valley has disappeared. A fog has crept in during the night and engulfed the plain as though the ocean was asserting its old dominion. Upon every hand the hills, that held the ancient sea in their long embrace, now clasp this fleeting phantom as though in its shadowy image there were cherished memories of the past. Above it, like islands, rise hills and peaks. As still as fleecy wool sleeps this soft, white sea. But even while you look and wonder, the sun asserts his power and the still lake swells in waves and rolls in billows. Through rifts you catch glimpses of houses, of forests and of fields, and then, you know not how

—you see not where—the fleecy mantle is gone, and the valley, in sheen and sunshine, is again before you.

Eighteen miles east of San Jose, upon the summit of Mount Hamilton, is the Lick Observatory. The road by which it is reached is twenty-four miles in length, was built by the county at a cost of $100,000, and is as complete as money and skill could make it. It connects with Alum Rock Avenue, about four miles from San Jose, and from this point is carried up the western slope of the hill. As the road ascends, the valley comes into view, each turn of the road disclosing some new charm. Seven miles of this, and the road passes to the eastern side, and the valley is no longer in sight. But with this change comes a new attraction. You are now in the mountains, and deep gorges upon the one hand and steep hillsides upon the other make the landscape; again, and the road is traversing valleys, gorgeous with wild flowers, or rolling hills dotted with stately oaks. Ten miles of this, and Smith Creek is reached. Here, in a charming nook of the mountain, half-encircled by a sparkling stream, a comfortable hotel is found. Near as the summit appears from this point, there is yet fifteen hundred feet of sheer ascent, and the road winds three times round the peak and is seven miles long in ascending it. As the summit is approached, the valley is unrolled before you, like a vast panorama, and the picture that was left behind is again in view, until at last, at a height of 4,250 feet, you are at the observatory. From here the view is grand and impressive. At your feet, dotted with villages, and rimmed in with a cordon of protecting hills, sleeps the valley in all its loveliness; and beside it the Bay of San Francisco, flecked with the sails of commerce. To the east, the snow-clad peaks of the Sierras bound the distant horizon, while south, the valley stretches away till hidden by the misty hills. Upon the west are the forest slopes of the Santa Cruz Mountains, with lakes and reservoirs that gleam in the sunlight like burnished silver; while upon the more distant horizon a lighter shade tells where sea and sky meet and mingle in the blue Pacific. North, if the day is clear, you are pointed to a dim shadow, scarce outlined on the distant sky, and as you strive to fix the wavering, doubtful image, you are told that this is Shasta, which, four hundred miles distant, and 14,400 feet high, is enthroned in undisputed majesty over the great valley. As you note this horizon stretching away upon every hand, you can readily accept the statement of Professor Whitney, that from the summit of this mountain more of the earth's surface is visible than from any other known point upon the globe; and the blue sky and translucent atmosphere attest the assertion that there are here twice the number of nights that are favorable to observations that are anywhere else to be found.

Upon this height stands the observatory, which the founder decreed should have the most powerful glass and thorough equipment that skill and ingenuity could produce; and most thoroughly have those assigned to this duty executed their trust. If years have been employed for the erection of these buildings, it is because they are to remain for the centuries, and they are as massive and as durable as the rock of which they seem but a part. In the equipment, the scientific knowledge and mechanical ingenuity of the world were called into requisition, and this is the grand result. Nor are the appointments of this place, perfect and ample as they are, better adapted to its purposes than are the natural surroundings. Elsewhere observatories are erected amid the busy marts of trade, and among the haunts of men. Here, the rugged mountain forbids all other companionship, and sterility and solitude keep sentinel watch at the portals of this temple of science. It is fitting that this be so, for what, to the watcher of the skies, are the aspirations of life, the ambitions of men? What to him are the boundaries of nations, or the measures of time? The field of his exploration is illimitable space, the unit of his line the vast orbit of the earth. The centuries of Egypt, hoary with age, are scarce seconds on his dial. The Pharaohs are to him but men of yesterday. He gauges the nebulous mist that enwraps Orion, that veils Andromeda, and proclaims the natal day of systems yet to be. He notes the changing hues and waning light of blazing stars, and declares when rayless and dark, with retinues of dead worlds, they shall journey on in the awful stillness of eternal night. Well may he who deals with these, the problems of the skies, dwell alone and apart from other men.

In the central pier, which supports the great telescope, is the tomb of James Lick. Lonely in his life, alone in his resting, this seems, indeed, his fit mausoleum; and the visitor reads, though it be unwritten, as his epitaph, the inscription in England's great cathedral on the tomb of its architect: "*Si monumentum requiris, circumspice.*"

The return trip is much more agreeable than the ascent. As the carriage sweeps down the mountain road, with its many curves, the landscape again unfolds, with scenes and shades that come and go like the figures of a kaleidoscope; and in three short hours the traveler is again in San Jose, with recollections of the mountain road, the marvelous prospect, the lofty mountains and the lonely tomb that can never be effaced.

The manufactures of San Jose, though as yet in their infancy, give promise of future importance. There are four fruit canneries, employing in the fruit season many hundred hands, mostly women and children; an extensive woolen mill, a silk factory, foundries, machine shops, planing mills, wineries, and other kindred industries. These are steadily enlarging and increasing, and give every indication of permanence and prosperity.

Much of the happiness of a community depends upon the social habits of its people. In San Jose social gatherings and festivities, picnics and excursions, are more frequent than in most Eastern communities. The weather permits, and the disposition of the people encourages them; and those relaxations which in most places are the privilege of the few, are here the practice of the many. In the summer, many families resort to the hills, or to Monterey Bay. Here in cottages, readily hired, in tents or booths, they remain for weeks, relieved of much of the formality, as well as the drudgery, of ordinary domestic life. Others, more adventurous, make up expeditions to the Sierras, Yosemite, or even Shasta. They take their own teams, and in capacious wagons store the bedding and supplies required for a month or more of nomadic life. Of the weather they take no heed, for that is assured. Wherever night overtakes them they camp, and remain or move on, as inclination or fancy may prompt. From the farmhouses they replenish their larder and procure feed for their teams. And they return after weeks of this gypsy life, with bronzed cheeks, to resume with renewed vigor the duties of life, to live over their past wanderings, and to plan new expeditions for the future.

Among the advantages of San Jose, not the least is the facility with which places of importance or interest can be reached from it—San Francisco in one hour; Santa Cruz, a delightful watering-place on the Bay of Monterey, in an hour and a half; Del Monte, Monterey and Pacific Grove in two hours and a half. With all these places the connection by rail is such that a person may reach them from San Jose after the business hours of one day, and be back before the resumption of business on the following day.

I have thus presented in general terms what I deem some of the principal advantages of this locality. To the interested reader, the question of expense is often of importance, and considerations of comfort, however apparent, must be subordinated to those of cost. The inquiries thus suggested I shall anticipate and endeavor to answer. This, it must be borne in mind, is not a newly settled State. Over a century ago, and while the region west of the Alleghanies was a trackless wilderness, there were here organized communities and flourishing settlements. To these settlers, as part of the policy of Spain and Mexico, had been granted, in tracts of leagues, the most desirable lands of the country. Since the acquisition of this territory by the Americans, successive immigrations have searched every nook for homes, and have appropriated all that has been thought available for settlement. The new comer can scarcely hope that anything very desirable has been overlooked by these explorers, and must expect to acquire by purchase from private owners. These are the approximate rates at which he will find lands held:—The willow lands at from $400 to $1,000 per acre, according to improvement; the adobe lands at from $75 to $125 per acre; the loamy and gravelly lands at from $50 to $100; hill land, adapted to fruit, at from $10 to $40; and grazing lands at from $5 to $10. Business lots in the City of San Jose, as elsewhere, vary according to location. Land within a mile of the centre of the town, and suitable for manufactories, may be obtained at from $500 to $1,000 per acre. The unit of measurement by which the town is laid out is the Mexican vara; and a fifty vara lot, one hundred and thirty-seven feet and nine inches square, is the usual dimension for subdivision. A fifty vara lot is regarded as ample for ordinary residence purposes, while a half or a third is very frequently employed. The price of a fifty vara lot in a location desirable for residences is about $2,000; its subdivisions in the same ratio. Well-built two-story houses, of from eight to ten rooms, cost from $4,000 to $6,000; cottages, which are now very much used, with from five to seven rooms, from $1,500 to $3,000. Comparisons of price lists show that the cost of food and household supplies is about the same as at the East. Meats and vegetables are cheaper; fruit of every description much cheaper. As to the latter, it may be added that their quality and price induce their very extensive use, and further, that the market season is here greatly prolonged. In localities to the north, the seasons are much earlier than in this valley, and, reversing the usual course of the seasons, the zone of maturing fruits moves southward, and the markets of San Jose are supplied from the north a month or more in advance of the product of this valley.

I have made no attempt to estimate profits in any of the industries I have considered. I have dealt only with production. The question of profit, here as everywhere, involves too many uncertain contingencies to be instructively considered; but here, as elsewhere, enterprise, industry and economy usually assure a very large measure of success, while the vocations through which this is sought may be pursued with more of convenience, of comfort and of satisfaction than in any known place in the world.

In this paper I have endeavored to represent to the visitor the surroundings he will here find; to the settler the conditions with which he will have to deal. I shall make no attempt to forecast even the near future; it is proclaiming itself. The tramp of a coming host is upon every hand; the tide of a human sea, impelled by forces that permit no ebb. It comes, and between the desert and the sea it finds the promised land—Egypt in its fertility; Sicily in its fruits and flowers; Italy in its beauty: America in its freedom, its enterprise and its energy.

IN MEMORIAM.

At a meeting of the members of the Bar to draft resolutions of respect to the memory of the late Chief Justice Morrison and Judge McKee, Judge Belden spoke as follows:

Gentlemen of the Committee and Members of the Bar,—There is very little that I can add to what is so well reported by your committee, so well expressed by my associate and by the brethren of the profession. It was a singular and sad coincidence when the same day took from the highest walk of our judicial profession two of its eminent members, men that have so long walked and worked together as leaders in the history of the State. Judges Morrison and McKee came here in pioneer days, young men; they entered upon their profession together while the State was yet in its infancy, practised at the same Bar, attained an honorable and enviable reputation as men of ability and spotless integrity, and were both, at an early stage in the jurisprudence of the State, called to preside as Judges in the Courts in which they had before been practitioners. For many years they occupied high positions in the Courts of *nisi prius* and maintained high reputations not for integrity merely, but for judicial ability as well. Together they were called to the highest Court of the State, and that under circumstances which demanded fearlessness as well as judicial ability. The State was entering upon a new career, under a new and untried Constitution, and issues of the gravest and most important character were constantly presented to the Supreme Court. Of the manner in which they discharged their duties, the records of the State are the full attestation. It is thus that Judges build their monuments, in the work that, performed from day to day, is to survive, and stands as the determination not only of the controversies of the present but as precedents for the future. It is by this, the work of to-day, but the rule for the future, that judicial merit is to be gauged. This was the position of these men; this the now finished record of their achievements; and we here but voice the echo of one deep grief welling up from every part of the State. Few men called to render an account of their earthly stewardship can return the talent committed to their charge with more of usance than these two brothers whom death has not separated, that have gone from among us. It was my good fortune to be personally acquainted with both of these men. My acquaintance with Judge McKee began in this county. I was his successor upon the Bench here, and ever found it far easier to occupy than to fill the position he so long graced. In character, ability, industry and all those qualifications essential to a Judge, that make a good Judge, he had no superiors, and in my judgment few equals. Of Judge Morrison it may be said that the affliction which clouded the latter years of his life—a misfortune with no taint of fault—hardly enables us to do full justice to his real merits or thoroughly appreciate his actual ability. The victim of a dread and incurable malady, a paralysis that palsied his limbs, he preserved an indomitable resolution that nothing could daunt, an energy that nothing could overcome, and insisted on discharging the high duties to which the voice of the people had called him, indifferent to the sufferings and distress which it imposed upon himself; he fell as falls the true soldier on the field of life's battle, with harness on and lance in rest, as falls the warrior on the field of carnage and of strife. In the lives these men have lived with and before us, in the manner in which duty has been met and responsibility fully and fearlessly discharged, these are examples for those who come after worthy of all imitation; while the faith in which they lived, and in whose light they ever walked, was with them in the final hour, and in the summons that called them hence they but heard the bidding of the Master—"Friend, come up higher." I concur in all that has been said, and so well said, of these our departed brethren. Fortunate it will be for any of us if, when called to render an account of our stewardship, as much of usefulness shall remain the monuments of our labors here, with so much of genuine sorrowing to attend us to our final resting-places.

Let the resolutions be spread upon the minutes of the Court, and let a copy be sent to the respective families of the late Chief Justice Morrison and Judge McKee.